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A

TREATISE

ON THE

LAW OF SLANDER

AND

LIBEL,

AND INCIDENTALLY OF

MALICIOUS PROSECUTIONS.

Nescit vox missa reverti.

SECOND EDITION,

WITH VERY CONSIDERABLE ADDITIONS.

By THOMAS STARKIE, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

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CHAPTER I.

Of the Evidence.

THE natural order of the evidence, in an action for slander, on the part of the plaintiff, where the general issue has been pleaded, is—

1st. Of special character and extrinsic facts, when they are essential to the action.

2dly. Of the act of speaking the words or publishing the libel.

3dly. Of the truth of the colloquium and innuendos.

4thly. Of the defendant's malice and intention, where malice in fact is material.

5thly. Of the damage.

First, as to the proof of special character, and other extrinsic facts.

Where the special character is essential to the action, it is alleged either generally or particularly.

When it is generally alleged, it is usually sufficient to prove, by general evidence, that the plaintiff is in the actual possession of the office or situation in which he has been defamed, with-

out strict proof of any legal inception or investment.

For in an action against a mere wrongful invader or disturber, a party is not to be put to the hazard or peril of giving detailed and conclusive proof of his title ; and it is to be presumed, till the contrary be shown, that he acted legally.

And, therefore, where a plaintiff avers generally that he filled any particular situation or office, in which he has been calumniated, or that he exercised any particular profession or business, it is sufficient to give general evidence of his having acted in that office or situation, or of his having exercised that particular profession, or carried on that trade or business. If the declaration allege that the plaintiff was, at the time of the alleged injury, a magistrate or peace officer (*f*), it is sufficient to show that he previously acted as such. If it allege that the plaintiff was an attorney of such a court, it is sufficient to show that he was before and at the time practising as an attorney of that court (*g*). It has indeed been

(*f*) Per Buller, J. *Berryman* v. *Wise*, 4 T. R. 366. *Gordon's* case. Leach. 581. *R.* v. *Shelly*, Leach. 581. n.

(*g*) *Berryman* v. *Wise*, 4 T. R. 366. Starkie on Evidence, iv. 372. In the case of *Berryman* v. *Wise*, 4 T. R. 366. the plaintiff averred that he was an attorney of the Court of King's Bench, and having been employed in a particular cause, had received a certain sum of money, which the defendant

doubted, whether, under an allegation that the plaintiff was at the time of the alleged slander a physician, it was necessary to produce a diploma; and the judges of the Court of Common Pleas were equally decided upon this question (*h*).

charged him with swindling, adding a threat, that he would move the court to have him "struck off the roll of attornies." Upon the trial before Thomson, Baron, at the York assizes, the plaintiff proved the words, and his having been employed as an attorney in that and other suits. It was objected that the plaintiff had not proved the first allegation, in his declaration, viz. that he was an attorney of the Court of King's Bench, which could only be proved by his admission, or by a copy of the roll of attornies; but the objection was over-ruled, the learned judge reserving the point with liberty to move to enter a nonsuit. Upon motion made to that effect, the court were of opinion, that the evidence was sufficient, for the defendant's threat imputed that the plaintiff was an attorney. And Buller, J. said, in the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters, without proving their appointments, and that even in case of murder. Excise and custom-house officers, indeed, fall under a different consideration, but even in their case, evidence was admitted, both in civil and criminal suits, to show that the party was a reputed officer prior to the 11th G. I. c. 10. s. 12.

(*h*) *Smith* v. *Taylor*, 1 N. R. 196. In the previous case of *Pickford* v. *Gutch*, Cor. Buller, J. Dorchester assizes, 1787, the action was brought for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, &c. of a physician, &c. To prove this, a person, who was a surgeon and apothecary, was called, who

The declaration stated, that the plaintiff, at the time of speaking the words, was "a physician." Upon the trial of the cause before Sir J. Mansfield, C. J. it was proved that the plaintiff had practised for some years as a physician in the town of Yarmouth; that Dr. Girdlestone, who was also a physician at Yarmouth, and of longer standing than the plaintiff, had been attending one Richard Helsden as a patient, and that the defendant was employed as his apothecary. That Dr. Girdlestone being obliged to leave Yarmouth for a day, the plaintiff was sent for, at the request of Helsden's wife, and prescribed for him; the prescription was made up by the defendant. On Dr. Girdlestone's return, the plaintiff requested that he might be sent for; Dr. G. refused, and the defendant then, with reference to the transaction, said, "I and Dr. G. both thought that Helsden was doing well, till Mrs. Helsden called in Dr. Smith, who has upset all that we have done, and die he (Helsden) must." *Moises* v. *Thornton* was cited, on the part of the defendant, to prove it to be necessary for the plaintiff to show

would have proved that the plaintiff for several years had prescribed, &c. as a physician, and that the witness had acted under him. But Buller, J. was of opinion, that the evidence was insufficient, and that it was necessary to produce the plaintiff's diploma; on which it was produced in court, and the plaintiff recovered.

that he was a *regular physician.* His lordship was of opinion, that the case was irrelevant, and the plaintiff obtained a verdict for £100. The case was afterwards argued on a rule to show cause why the verdict should not be set aside, and a new trial had; and the learned judges not being agreed, delivered their opinions *seriatim*, Sir J. Mansfield, C. J. and Heath, J. agreeing that the plaintiff was entitled to recover without further proof; and Rooke and Chambre, Justices, conceiving it to be requisite for the plaintiff to prove that he was lawfully authorized to practise. As the court were equally divided, the plaintiff of course retained his verdict.

The argument for the necessity of proving a regular diploma in that case, seems to resolve itself principally into the question, whether, where a statute prohibits the entering in a particular situation or office, without some particular previous qualification, it be necessary in an action by a party aggrieved, in that character, to prove such qualification; for no precise form is essential to the constituting a physician (*i*); and physicians were contemplated and recognized by the law as such, before the passing of the statute, which made particular qualifications

(*i*) See 5 Com. Dig. tit. physician.

essential to the legal exercise of their profession. On general legal principles, it seems, that no such proof is essential; for in general, it is to be presumed, that a party who acts in a particular situation, acts legally in that situation, and that he has conformed to and not violated the law in so acting. This presumption is made in favour of innocence, even where the plaintiff seeks to enforce a civil contract, which would not be valid without such conformity (*k*). A *fortiori* the presumption ought to be made against a mere wrong-doer (*l*).

It has been expressly decided, that an attorney in an action for a libel upon him, in his professional character, is not bound to prove that he has duly taken out his certificate according to the statute (*m*).

(*k*) As in an action on an attorney's bill, see Starkie on Evidence, tit. attorney. By the express provisions of the statute 55 G. 3. c. 194. s. 21., an apothecary cannot recover for business done without proof of qualification, but that is by the express provision of the statute.

(*l*) See Starkie on Evidence, iv. 1249.

(*m*) *Jones* v. *Stevens*, Exch. Trin. T. 1822. 11 Price, 235. It was held, in that case, that an attorney might recover for a libel upon him in his professional character, even although evidence was given on the part of the defendant, that no certificate had been taken out by the plaintiff, from Nov. 1813 to Nov. 1814; or from Nov. 1821 to Feb. 1822, when the last cer-

In the subsequent case of *Pearce* v. *Whale* (*n*), the court held that it was not sufficient for the defendant to shew that the plaintiff, who sued as an attorney for fees, had neglected to take out his certificate in previous years, without also giving evidence to negative his re-admission as an attorney.

But although the allegation of character be general, yet if there be reason to apprehend that the defendant means to dispute the plaintiff's title to the office, situation, or other special character to which the slander or libel relate, it would be prudent to be prepared with the best evidence to establish the fact. For although the proof of the negative might lie, in the first instance, on the defendant, yet such evidence might be offered as would suffice to establish the negative in the

tificate was obtained, and that the plaintiff had, during those periods, practised as an attorney; notwithstanding this evidence, the court held that although the plaintiff might be disabled by the stat. 37 G. 3. c. 90. from maintaining any action for fees, yet that he did not, by the omission, entirely lose his character of an attorney, and was not to be subjected, in addition to the penalty and disability imposed by the statute, to be aspersed and reviled in that character. But note, that no negative evidence was given to shew that the plaintiff had not been re-admitted. See *Pearce* v. *Whale*, 5 B. & C. 38.

(*n*) 5 B. & C. 38.

absence of affirmative proof, the more especially if the plaintiff was apprized of the defendant's intention to dispute the plaintiff's title to the special character.

But where the plaintiff himself specifies the particular mode in which he was invested with the particular character in which he has been injured, he must, it seems, prove such a descriptive allegation, with its circumstances, although a more general allegation would have been sufficient. For though a totally irrelevant allegation may be rejected as surplusage, one which is material to the cause of action, and which is descriptive of the legal injury, must be proved as laid (*p*).

(*p*) The rule in principle seems to be this, that if the plaintiff, instead of averring his special character generally, merely alleges the mode of appointment or investment, he must prove the fact, for, being material to the right of action, it cannot be rejected; if it were rejected, no sufficient cause of action would be alleged. But where the plaintiff alleges his appointment cumulatively, as if he allege that he is an attorney, and has been duly admitted, &c. or that he is a physician, and has taken his degree, &c. it may well be doubted whether, in principle, strict proof of his admission or diploma be necessary. For such allegations may be regarded as *cumulative* rather than *descriptive*, and there seems to be no reason why, in such a case, the legal investment, by admission or otherwise, should not be presumed from evidence that the party has acted in the particular character. If it is to be presumed, from such evidence, that the party is an attorney,

The defendant (*q*) said of the plaintiff, "He is a quack, and if he shews you a diploma, it is a forgery."

The declaration averred that the plaintiff "was a physician, and had regularly taken his degree of doctor of physic."

In support of this averment, he produced a diploma, purporting, on the face of it, to have been granted by the University of St. Andrew's, in Scotland, and to have the university seal appendant to it. To authenticate this, a witness was offered, to prove that the rector and professors of the University of St. Andrew's had acknowledged, in his presence, their signatures subscribed to the diploma. The same witness was ready to prove a certificate, by the master and professors, of the due taking of the degree, and an acknowledgment by the seal-keeper of the university, that the seal appendant to the diploma was the seal of the university. Lord Kenyon, C. J. deeming this evidence to be insufficient, the plaintiff was nonsuited. A motion for a new

why is it not also to be presumed that he has been admitted an attorney. The latter presumption indeed necessarily involves the former, a presumption of a particular fact necessarily includes the presumption of every thing which is essential to that fact, and without which it could not have been.

(*q*) *Dr. Moises* v. *Dr. Thornton*, 8 T. R. 303.

trial was afterwards refused, on the ground, that the plaintiff having averred that he had duly taken the degree of doctor of physic, he was bound to prove it; and it was observed, by Lawrence, J. "even if it be not necessary in general, for the party to shew that he has taken his degree, in this case it is necessary on account of the plaintiff's allegation."

Lord Kenyon, C. J. also observed, that the best evidence to prove the taking of a degree is by the production of the books containing the act of the corporation by which the degree is conferred.

But, in general, if the slander or libel assume that the plaintiff possesses the character or fills the situation or office in which he is defamed, or assumes the truth of facts to which the slander or libel relates, and which are averred in the declaration, it operates by way of admission, and no further evidence of the fact is necessary. Thus where the plaintiff, being an attorney, brought his action for words used by the defendant, by which he threatened that he would have the plaintiff struck off the roll of attornies, it was held that proof of the plaintiff's being an attorney was unnecessary, for the words imported the fact (*r*).

(*r*) *Berryman* v. *Wise*, 4 T. R. 366; and see *Smith* v. *Taylor*, 1 N. R. Where the plaintiff alleged, generally, that

The plaintiff alleged that he had been appointed by certain persons, exercising the powers of government, in a certain republic or state in parts beyond seas, to wit, in the republic or state of Chili, in South America, to the office or station of envoy extraordinary and minister plenipotentiary to and at the courts of Europe, &c.

It was objected, at the trial, that the plaintiff had not proved that there was such a state as Chili, but the defendant having asserted, in the alleged libel that the plaintiff had colluded with J. H., fraudulently to obtain money in the matter of a loan for *the republic or state of Chili*, &c. it was held to be sufficient proof of the existence of such a state (*s*).

Where a libel alleged that certain acts of outrage had been committed, it was held that this was evidence to support an averment of the fact, in the introductory part of the record (*t*).

he was an attorney, and the words were, "He is a pettifogging blood-sucking attorney;" it was ruled that no extrinsic evidence to prove the plaintiff to be an attorney was necessary. *Armstrong* v. *Jordan*, Cor. Hullock, B. Carlisle Sum. Ass. 1826.

(*s*) *Yrissair* v. *Clement*, 3 Bing. 432.

(*t*) See the observations of Bayley, J. in 4 M. & S. 548; and note, that though the information alleged that outrages had been committed *in* and in the neighbourhood of Nottingham, it was held that the allegation was divisible, and that

In the next place it is necessary to prove all those prefatory allegations of facts, in relation to which the illegality of the words or libel consists.

Any material variance in the proof of such averments will, it has been seen (*u*), be fatal, although it is otherwise where the allegation of the extrinsic fact is purely immaterial (*x*), or where the prefatory subject matter is in its nature divisible, and so much is proved as would, had it been alleged without more, have been sufficient (*y*).

2dly. as to the fact of publication.—Where the action is for words spoken, evidence of the speaking before any third person will be sufficient, though the declaration allege them to have been spoken before A. B. and others (*z*). And where the words are in themselves actionable, it is sufficient to prove some of them which are actionable, provided they be proved as laid (*a*).

If the words be spoken, or libel published, in a foreign language, or in characters not under-

it was not necessary to prove that outrages had been committed in both places.—Ib.

(*u*) Supra, vol. I. 405.

(*x*) Supra, ib. 406.

(*y*) Supra, ib. 407.

(*z*) B. N. P. 5.

(*a*) 2 East, 434, 8 T. R. 150. supra, 309. and see Append.

stood by those who hear or see them, there is no publication, since there is no communication prejudicial to the plaintiff; and if the words be spoken, or libel addressed, to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the defendant's act (*b*), but a publication to the prosecutor only would be sufficient to sustain an indictment on the ground of its tendency to produce a breach of the peace (*c*).

Where a witness, who has heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words (*d*); and if the words have

(*b*) 1 Will. Saun. 132. n. 2. *Phillips* v. *Janson*, 2 Esp. C. 226. and see *Hicks's* case, Hob. 215. *R.* v. *Wegener*, 2 Starkie's C. 245.

(*c*) But where a libel, reflecting on the prosecutor in his profession as a solicitor, was sent as a letter, and published to the prosecutor alone, and the indictment alleged that it was published with intent to injure the prosecutor in his profession as a solicitor, it was held (by Abbott, J.) that the indictment could not be supported, and that it should have been alleged to have been published with intent to provoke the prosecutor and excite him to commit a breach of the peace; and that where a letter, containing a libel, is sent to the wife, it ought to be alleged to have been published with the intent to disturb the domestic harmony of the parties. *R.* v. *Wegener*, 2 Starkie's C. 245.

(*d*) Per Holt, C. J. *Sandwell* v. *Sandwell*. Holt. R. 295.

not been written immediately, the witness may refer to his minutes to refresh his memory (*e*).

In case of libel, before any evidence can be given of its contents, *primâ facie* evidence must be given of a publication by the defendant. Evidence of a publication is either of a publication *generally*, or of a publication in some *particular county* or place, and it is either *direct* or *indirect*.

To support a civil action it is essential, as has already been observed, to prove a publication of the libel to some third person (*f*); But where the defendant, knowing that letters addressed to the plaintiff were usually opened and read by his clerk, wrote a libellous letter and directed it to the plaintiff, and his clerk received it and read it, it was held that there was a sufficient publication to support the action (*g*).

The publication may be *directly* proved, by evidence that the defendant, with his own hand, distributed the libel, or exposed its contents, or painted an ignominious sign over

(*e*) Holt's. R. 295.

(*f*) Supra, vol. II. 13. Where a libel, contained in a letter folded, but not sealed, was delivered to a third person, to be conveyed to the plaintiff, and was so conveyed without having been read by any one, it was held that no action could be supported. *Clutterbuck* v. *Chaffers*, 2 Starkie's C. 471.

(*g*) *Delacroix* v. *Thevenot*, 2 Starkie's C. 63.

the door of another, or took part in a procession carrying a representation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, or by evidence of his maliciously reading or singing the contents of the libel in the presence of others; all of which facts are direct proof of the averment that the defendant published the alleged libel (*h*). But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel published is in the hand-writing of the defendant; when the plaintiff has proved this, he has made out such a *primâ facie* case as entitles him to have the contents read in evidence (*i*).

It was observed by a great authority (*k*), that "When a libel is produced written in a man's own hand, he is taken in the *mainer*, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him."

The grounds of this presumption are plain and

(*h*) 5 Rep. 125. 9 Rep. 59. b.

(*i*) Burr. 2689.

(*k*) Per Holt, C. J. *R.* v. *Beere*, Ld. Ray. 417. *Mullett* v. *Hulton*, 4 Esp. C. 248.

reasonable. No man incurs any civil responsibility by what he thinks or even writes, unless he divulge his thoughts to the temporal prejudice of another; but it seems to be equally clear, in point both of law and expediency, that if he write what is false, and the calumny become public to the detriment of its object, he is just as responsible for the effects of his negligence as if he had been the voluntary publisher of the scandal; and that, if a man write libels for his own perusal, he must be content to enjoy the satisfaction, diminished by the risk and peril of an accidental publication and its consequences (*l*).

The writing a libel (*m*) does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred. What amounts to a publication is usually a question of fact falling within the province of the jury to decide (*n*), and though proof that the libel is in the

(*l*) Supra. Vol. I. 225.

(*m*) *Lamb's* case, 9 Rep. 59. 15 Vin. Abr. 91. Mod. 813.

(*n*) *Baldwin* v. *Elphinstone*, Bl. R. 1037; that is, it is a question for the jury, in doubtful cases, whether there has in fact been any publication of the libel to a third person; but, where the facts are clear, the question of publication is one of law for the decision of the court. If (in an action for damages) the facts were that the defendant had posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication;

hand-writing (*o*) of the party, goes far in fixing him with the publication, he is still at liberty to

but if it were doubtful whether, before it was taken down, some one had not read it, that would be a question of fact for the jury. See Starkie on Evidence, tit. Law and Fact. *Delacroix* v. *Thevenot*, 2 Starkie's C. 63. *Clutterbuck* v. *Chaffers*, 1 Starkie's C. 471.

(*o*) The best evidence to prove the hand-writing in question, is that of a witness who actually saw the party write it: such direct evidence can, however, seldom be procured; and, in general, to prove the hand-writing of a person, any witness may be called who has by sufficient means acquired such a knowledge of the *general character* of the hand-writing of the party, as will enable him to swear to his *belief* that the hand-writing in question is the hand-writing of that person. B. N. P. 236. *Lord Ferrers* v. *Shirley*, Fitzg. 195.

This knowledge of the general character of the party's hand-writing, may have been acquired from having seen him write, although but once, *Garrels* v. *Alexander*, 4 Esp. C. 37.; or, if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the hand-writing from a correspondence with the party upon matters of business, or from any other transactions between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent to a particular person, on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be. Per Lord Kenyon, *Cary* v. *Pitt*, Peake's L. E. 105. For when letters are so written in the usual and ordinary course of business, it is reasonable to presume that they were really written by the person by whom they purport to have been written, and that they have not been

rebut the strong presumption thus raised against him, by reconciling the fact with his innocence.

fabricated to answer a particular purpose. In such case it is obviously essential, that the identity of the correspondent whose letters have been received, with the party whose hand-writing is to be proved, should be established either by the witness who received the letters, or by other reasonable evidence.

In the case of *Lord Ferrers* v. *Shirley*, Fitzg. 195. where the issue was upon the execution of a deed, by Lord Ferrers, a witness was called to prove the hand-writing of Cottington, a subscribing witness, who was dead: he stated that his master had held an estate under the late Lord Ferrers, and that he had seen several letters appearing to have been written by Cottington, for the rent of the estate, and that his master had told him that they were the letters of Cottington, Earl Ferrers's steward. The court, in this instance, rejected the witness, because he could not prove the identity of Cottington, Fitzg. 195; but Lord Raymond said, that it was not necessary, in all cases, that the witness should have seen the party write to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out that the party writing is the same man that attested the deed, it will enable the witness to swear to that person's hand-writing, although he never saw him write. And Page, J. said, if a subscribing witness to a deed live in the West Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand-writing, by having seen the letters of such person, written by him to his correspondent in England; because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great of proving the hand-writing of such subscribing witness. The court in

Hand-writing must be proved by those who know the general character of the hand-writing of the party, and not by comparison of hands, for

this case rejected the testimony, not on account of the insufficiency of the evidence to prove the hand-writing to be that of the person who had written the letters demanding rent, but because the identity of that person with Cottington, the attesting witness, had not been made out.

The mere seeing the superscription of letters, at the post-office, purporting to have been franked by the party, is not a sufficient foundation for this kind of evidence, *Cary* v. *Pitt*, Peake's Ev. 105. And see *Lord Ferrers* v. *Shirley*, Fitz. 195. for the superscription may have been forged. A witness who swears to his belief of hand-writing, must form his judgment from his recollection of the general character of the hand-writing of the party, and not from any extrinsic or collateral circumstances. Mr. Caldecot was allowed to state his belief that the hand-writing was not that of Mr. Mickle, the author of the Luciad, because he was a very correct man in making capital and small letters where such were required; and in the writing produced, that correctness was not observed, for the observation arose from the character of the hand-writing itself. See *Dacosta* v. *Pym*, Append. to Peake's L. E.

But in the same case, of *Dacosta* v. *Pym*, the witness saying that the hand-writing was like the plaintiff's, but that he did not think it was his, because the plaintiff was too much a man of the world to sign such an account; Lord Kenyon held, that the answer was improper, and that the witness ought to found his opinion upon the character of the hand-writing only.

Where the witness had never seen the defendant (who was sued as the acceptor of a bill of exchange,) write his name till after the commencement of the action, and then only for the

jurors may not, it is said, be competent to make the comparison (*p*); this reason, how-

purpose of showing him the difference between his hand-writing and that of the acceptance to the bill, his testimony was held to be inadmissible. 1 Esp. C. 14, 15. Vide 4 Esp. C. 27.

(*p*) By comparison of hands is now meant a comparison by the juxta-position of two writings, in order by such comparison to ascertain whether both were written by the same person; *Brookbard* v. *Woodley*, Peake's C. 21. *Macpherson* v. *Theytes*, Peake's C. 20. *Stranger* v. *Searle*, 1 Esp. C. 14. *Goodtitle* v. *Braham*, 4 T. R. 497. Here it may be observed, that such evidence as is now deemed to be receivable and legal evidence of hand-writing, as distinct from evidence by comparison of hands, seems formerly to have been considered as evidence by comparison of hands, and as inadmissible, at least in criminal cases. In the case of *Algernon Sidney*, 3 St. Tr. 802. 3 Car. II. two of the witnesses who swore to their belief of his hand-writing had seen him write, and the third had paid bills purporting to have been indorsed by the defendant. Yet the prisoner, in his defence, insisted that nothing but comparison of hand-writing had been offered in evidence against him. And the statute reversing his attainder, recites that there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, but which was not proved by any one witness to have been written by him, but that the jury were directed to believe it by *comparing* it with other writings of his. So also in the celebrated case of the *Seven Bishops*, 4 Jac. II. 4. St. Tr. 338. Sir Thomas Exon stated, that he had never seen the Archbishop of Canterbury write five times in his life, but that he believed one of the signatures on the paper produced to have been written by the archbishop.

ever, is not satisfactory; for if the jurors cannot read, they may nevertheless receive the

Mr. Brookes stated, that he believed another signature to have been written by the Bishop of Ely; but, upon cross-examination, it turned out that his belief was founded upon the resemblance which the writing bore to that contained in a letter sent to the Bishop of Oxford, which letter the witness concluded to have been written by the Bishop of Ely from having waited upon him with the Bishop of Oxford's answer, and communicated with him on the subject of the original letter.

Upon this evidence, Mr. Justice Powell observed, "That's a strange inference, Mr. Solicitor, to prove a man's hand."—Mr. Attorney General—"We have more evidence, but let this go as far as it can." Mr. Serjeant Pemberton—"Certainly, my lord, you will never suffer such a witness as this." Lord C. J. Wright—"Brother Pemberton, I suppose they can prove it otherwise, or else this is not evidence."

After some other evidence had been given, Mr. Justice Powell observed, "Mr. Solicitor, I think you have not sufficiently proved this paper to be subscribed by my Lords the Bishops." Mr. Solicitor General, "Not to read it, sir?"—Mr. J. Powell, "No, not to read it: it is too slender a proof for such a case. I grant you, in civil actions a slender proof is sufficient to make out a man's hand, by a letter to a tradesman or a correspondent, or the like; but in criminal cases, (such as this is,) if such a proof be allowed, where is the safety of your life, or any man's life, here?"—Mr. Solicitor General, "We tell you a case where it was allowed, and that is Mr. Sidney's case—a case of treason, and printed by authority. We tell you nothing but what was done the other day."

L. C. J. Wright—"I tell you what I say to it: I think truly there is proof enough to have it read, and I am not

evidence of witnesses who are able to make the comparison. It has also been suggested,

ashamed nor afraid to say it, for I know I speak with the law, say what you will of criminal cases and the danger of people's lives; there were more danger to the government, if such proof were not allowed to be good."—Mr. J. Powell—"I think there is no danger to the government at all, in requiring good proof against offenders."—Lord C. J.—"Here's my Lord Archbishop, and the Bishop of St. Asaph, and my Lord of Ely; their hands are proved; it is proved to be my Lord Archbishop's writing by Mr. Brookes; and he proves my Lord of Ely's hand by *comparison*, and so my Lord of Asaph's. Now, brother, Pemberton, there's an answer to your objection. It being proved that it is all my Lord Archbishop's hand-writing; then they come and say, 'We'll prove the hands of the others by *comparison*;' and for that they bring you witnesses, that say, they have received letters from, and seen their hand-writing several times; and comparing what they have seen with this very paper, says the witness, 'I do believe it to be his hand.' Can there be a greater evidence, or a fuller."—Mr. Serjeant Pemberton—"Admit it to be full evidence against my Lord Archbishop; what's that to the rest? There's no evidence against them."—Mr. Justice Allybone—"Brother Pemberton, as to the objection you make of comparing hands, it is an objection indeed, I do agree; but then consider the inconvenience which you and Mr. Polexfen do so much insist upon. If a man should be accused by a comparison of hands, where is he; he is in a most lamentable case, for his hand may be so counterfeited, that he himself may not be able to distinguish it.—But then you do not consider where you are, on the other side; that may be an objection in matters of fact, that will have very little weight, if compared and set altogether. For, on the other side, where shall the government be, if I

that if such a comparison were to be allowed, an unfair selection of specimens might be made for

will make libels, and traduce the government with prudence and discretion, and all the secrecy imaginable: I'll write my libel by myself, prove it as you can. That's a fatal blot to the government, and therefore the cases are not the same, nor is your doctrine to pass for current here, because every case depends upon its own facts. If I take upon me to swear I know your hand, the inducements are to myself, how I came to know it, so as to swear to it. Knowledge depends upon circumstances; I swear that I know you, but yet I may be under a mistake, for I can have my knowledge of you no other way but from the visibility of you. And another man may be so much like you, that there is a possibility of my being mistaken; but certainly that is evidence, good evidence. Now here are several gentlemen that swear as to my Lord Archbishop's hand-writing. I do agree as to some of the others, that the evidence is not so strong for what that man said, that he did believe it was rather such a lord's hand, than that which went before, or that which came after, it is of no weight at all, and so some of the others, but it is positively proved against my Lord Archbishop. And one or two more, so that that's enough to induce the reading of this writing."

Mr. Justice Holloway—"Good, my Lord, let me give my opinion."—Lord C. J.—"With all my heart, brother."—Mr. J. Holloway—"My Lord, I think, as this case is, there ought to be a more strong proof; for certainly the proof ought to be stronger and more certain in criminal matters than in civil matters. In civil matters we do go upon slight proof, such as the comparison of hands for proving a deed, or a witness's name, and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and

the purpose of comparison; this, however, would be open to inquiry and observation, and

substantial proof, that is fitting for us to have in such a case, and without better proof I think it ought not to be read."

L. C. Justice—"You must go on to some other proof, Mr. Solicitor, for the court is divided in their opinions about this proof."

The defendant* having committed a riot upon the person of Sir F. W. in his own house, an information was filed against him, and he produced a witness to swear to the contents of a letter from the prosecutor, who deposed it was in the same hand with another letter which had been admitted to be read in evidence. But Holt, C. J. said, "In the case of a deed lost or burnt, we will admit a copy or counterpart, or the contents to be given in evidence; but we never permit it, unless it be proved that there was such a deed executed. Now here the witness cannot prove this letter written for, he never had *seen* the prosecutor write," and therefore it was disallowed.

In *Crosby's* case, 12 Mod. 72. Holt, 753. Salk. 689. Ld. Raymond, 39, which was a trial before Holt, C. J. for high treason, several treasonable papers were produced, which the witnesses swore they believed to be in the hand-writing of the prisoner. And on this a question arose, whether *comparison* of hands was evidence. And the court held, that though it was not sufficient for the original foundation of an attainder, it might be well used as a circumstantial and *confirming evidence*†, if the fact be otherwise fully proved, as in *Lord Preston's* case, where it was proved that he attempted to go with certain papers into

* *R.* v. *Sir T. Culpepper*, Holt's. R. 293.

† See the cases of Layer, Ld. Preston, Algernon Sidney, St. Tr. and of Buchanan, and Dr. Hensey, 1 Bur. 642. and the trial of O'Connor and others, at Maidstone.

scarcely seems to be a ground for the total exclusion of such evidence; and, perhaps, after all, the most satisfactory reason is, that if such comparisons were to be allowed it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length; for, in every case, it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen (if the present rule were to be broken through) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent. The ordinary practice is seldom attended with inconvenience; for if the hand-writing be not that of the party, it is more easy for him to disprove it than it would be for his adversary to prove it in case it were genuine; for it must be within his own peculiar knowledge what witnesses have so intimate an acquaintance with his hand-writing as to be able to prove the

France, and where they were found upon his person; but that, in the principal case, since they were found elsewhere, to convict on a similitude of hands, would be to run into the error of *Colonel Sidney's* case. Upon this trial, the prisoner produced a copy of the act of parliament for the reversal of Sidney's attainder, in which it is declared that the comparison of hands is not legal evidence.

forgery; but where it is genuine his adversary has the witnesses to seek for. It cannot, however, be denied, that, abstractedly, a witness is more likely to form a correct judgment as to the identity of hand-writing, by comparing it critically and minutely with a fair and genuine specimen of the party's hand-writing, than he could be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention.

In some instances, where the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison of hand-writing with documents known to be in his hand-writing has been admitted (*q*).

In the case of *Revett* v. *Braham* (*r*), a clerk from the post-office, who had been employed to inspect franks and detect forgeries, was admitted on a trial at bar to give his opinion, as a matter of skill and judgment, whether a will was written in a natural or imitated character. He admitted, in his examination, that he had never detected an imitation of the hand-writing of an old person

(*q*) By Le Blanc, J. *Roe* v. *Rawlings*, 7 East, 282. B. N. P. 236. See also *Taylor* v. *Cooke*, 8 Price, 653.

(*r*) 4 T. R. 497.

who wrote with difficulty, and who might be supposed frequently to stop; and that he judged principally by seeing whether the letters were what is call painted, or passed over by the pen a second time, which might happen to any person from a failure of ink. After giving it as his opinion that the will was not genuine, a paper was produced, admitted to have been written by the person suspected of having forged the will, and he was asked his opinion whether that paper and the will had been written by the same person, and the question was objected to, but admitted by the court. But, in the case of *Cary* v. *Pitt* (*s*), Lord Kenyon refused to admit the testimony of an inspector of franks at the post-office, to prove that the hand-writing of the acceptance of a bill of exchange purporting to be the defendant's, was genuine; saying, that although such evidence had been received in the case of *Revett* v. *Braham* (*t*), yet that, in his charge to the jury, he had laid no stress upon it. And in the case of the *King* v. *Cator* (*u*), an inspector was admitted to swear (*v*) that the libel was written in a disguised

(*s*) Peake's L. E. Append.

(*t*) 4 T. R. 497.

(*u*) 4 Esp. C. 117.

(*v*) In a late case, evidence of the opinion of an inspector of franks at the post-office, whether the writing was in a natural or imitated character, was held to be of so little weight,

hand; but he was not allowed to give his opinion upon a comparison of the libel with another writing, whether they had been written by the same person.

The same rules which apply to the proof of hand-writing in civil, apply also to evidence in criminal proceedings (*x*), although, formerly, the rule in criminal cases was more rigid than in civil actions (*y*).

The wilful and intentional delivery of a libel, by way of sale or otherwise, as by a bookseller or hawker, is a sufficient publication, though the party so publishing did not know the contents (*z*).

that the court of K. B. refused to grant a new trial, on the ground that such evidence had been rejected at the trial, *Gurney* v. *Longlands*, 5 B. & A. 330.

(*x*) *Francia's* case, 6 St. Tr. 70. *Layer's* case, Ibid. 275. *R.* v. *Hensey*, 1 Burr. 644. *Ld. Preston's* case, 4 St.Tr. 446. *De la Motte's* case, Howell's Equ. 2 T. R. St. Tr. vol. 21. p. 810. *The Attorney General* v. *Le Merchant*, 2 T. R. 201. note (*a*). B. N. P. 236. *R.* v. *Cator*, 4 Esp. C. 117.

(*y*) Per Kelynge, C. J. *Carr's* case, and 4 St. Tr. 338.

(*z*) Wood's Inst. 431. Moore, 627. It is said, "It is not material whether the person who disperses libels is acquainted with their contents or otherwise, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. And that, on this foundation, it has been constantly ruled of late, that the buying of a book or paper containing libellous matter, at a bookseller's shop, is sufficient

So a printer is liable, though he printed a libel in the way of his trade (*a*).

A defendant may be guilty of publishing a libel not only by distributing copies of it with his own hand, but by employing an agent for the purpose (*b*).

The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary either in a civil or criminal proceeding; in civil proceedings, the principal is to all purposes identified with the agent employed by him to do any specific act, and in treason and misdemeanors (*c*) all accessories are considered as principals.

A consent by the master to the act of the servant in printing a libel, is *primâ facie* evidence of a publication by the master (*d*).

evidence to charge the master with the publication, though it does not appear that he knew of any such book being there, or what the contents thereof were, and that it will not be presumed that they were brought there by a stranger; but the master, if he suggests any thing of this kind in his excuse, must prove it." Bac. Ab. tit. Libel, 458.

(*a*) *R.* v. *Dover*, 16 C. II. 2 St. Tr. 547. Hargreaves's ed.

(*b*) 7 East, 65. Bac. Ab. tit. Libel, 458.

(*c*) 2 Hall's P. C. 613.

(*d*) *R.* v. *Harris*, 2 St. Tr. 1039. See Ld. Camden's observations in *Entick* v. *Carrington*, 11 St. Tr. 322.

An allegation that the defendant published the libel is satisfied by proof that it was published by his agent (*e*), if an authority from the principal to the agent can be proved; and although an authority to commit an unlawful act will not in general be presumed, yet it is otherwise in the case of booksellers and others, where the book or libel is purchased from an agent in the usual course of trade (*f*).

(*e*) Hale's P. C. 613.

(*f*) Bac. Ab. tit. *Libel*, 458. The following are the principal cases which have been decided on this point. In *Elizabeth Nutt's* case, Fitzg. 47. 2 G. 2. the defendant was tried on an information for publishing a treasonable libel. It appeared in evidence that the defendant kept a pamphlet shop, and that this libel was sold in the shop by the defendant's servant, for the defendant's use and account, in her absence, and that she did not know the contents of it, nor of its coming in or going out; and per Raymond, L. C. J. notwithstanding the defendant is guilty of publishing this libel, the shop being kept under her authority and direction, it would be a very dangerous thing that the law was otherwise, and it has been so ruled in a great many instances. But the jury being unable to agree in a general verdict, and thinking it a hard case upon the defendant, refused to find a general verdict, and were desirous of finding the facts specially; and, ultimately, the Attorney-General agreed to withdraw a juror, which was done. According to the report of the same case in Barnardiston, 306. the Lord Chief Justice observed, that if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read. It is impossible not to dissent from this doctrine so expressed, without the qualification

The sale by an agent in a shop in the usual course of business is *primâ facie* evidence of a publication with the knowledge and privity of

added that the servant had some reason to know that he was discharging an illegal mission.

In the case of the *King* v. *Dodd*, 2 Sess. 33, on an information for selling and publishing a libel against Ch[illegible]s, it was insisted upon, for the defendant, that she was sick, and that the libel was taken into her house without her knowledge. But, by the court, this is no excuse, and the law presumes him to be acquainted with what his servant does. Mr. J. Fortescue said, that it had been ruled, that the finding a libel on a bookseller's shelf was a publication of it by the bookseller. And L. C. J. Raymond said, it hath been ruled that where a master being out of town, his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence.

In the case of the *King* v. *Almon*, 5 Burr. 2689, the liability of booksellers was much discussed, and the court expressed an opinion that the sale of a libel in a bookseller's shop, was *primâ facie* evidence of a publication, though not so *conclusive* but that it might be rebutted by circumstances. It does not indeed appear what would have been deemed by the court, to be sufficient to rebut such primâ facie evidence, and to excuse the owner; but it seems to be clear, from the general context of the decisions on this subject, that a bookseller is considered as standing in a situation of peculiar responsibility, and that he is liable criminally as well as civilly, for libels sold in his shop in the usual course of business, though without his particular knowledge.

The defendant had been convicted of publishing a libel (one of Junius's letters) in one of the magazines, called the London

the owner; and although it be not conclusive evidence, yet it throws upon him the necessity of

Museum, which was bought at his shop, and purported to be printed for him.

The defendant was found guilty on proof that the libel in question had been sold in his shop. A motion was afterwards made for a new trial, on an affidavit, the principal bearing of which was, that the libel had been sent to his shop, and sold there by a boy without his knowledge, privity, or approbation. But the court were of opinion, that none of the matters on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment; for they were extremely clear and unanimous in opinion, that this libel, being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, was a sufficient *primâ facie* evidence of its being published by him; not indeed conclusive, because he might have contradicted it, if the facts would have borne it by contrary evidence.

In the above case Lord Mansfield observed, "A libel cannot be read against a defendant before it has been proved upon him. This must, however, be understood of such *primâ facie* proof of publication as would be sufficient to be left to a jury; for no evidence on the part of the plaintiff or in support of a prosecution, can in strictness amount to proof, since the evidence of any witnesses, is always liable to be rebutted by opposite testimony, and must after all depend for its effect upon the credit given by the jury to the character of the witnesses, and the circumstances under which such evidence is given." Aston, J. observed, that the evidence of his publishing that which was bought in his shop, must stand till the contrary appears. There may, indeed, (he said) be circumstances

rebutting the presumption by evidence to the contrary (*g*), even although the principal lives at a distance from his shop (*h*). But the defen-

of extenuation, or even of *exculpation*, and if it were a surprise upon him, the court would have regard to such circumstances as far as they merited their regard, and he cited *Harris's* case, 5 St. Tr. 1037. *Hudson's* case, Hil. 3 G. 1. and *R.* v. *Nutt*, Fitzg. 47. *Harris's* case, it is observable, is little to the point, there was evidence that the defendant gave directions for printing the libel; that it was afterwards sold in his shop, and that he had acknowledged the publication.

In the *King* v. *Walter*, 3 Esp. C. 21. Lord Kenyon held, that the proprietor of a newspaper was answerable criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper; he said, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, and to which he subscribed. This he added, was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libels. The same doctrine is said to have been held in the case of the *King* v. *Cuthel*, K. B. 1799, and by Lord Ellenborough, C. J. in *R.* v. *White*, Guildh. 1811. See Holt's Law of Libel, 287. The sale of every separate copy of a libel is a distinct offence, *R.* v. *Carlile*, 1 Chitty, 453.

(*g*) Ibid: and *R.* v. *Almon*, 5 Burr. 2689. *R. v. Dodd.* 2724, 2 Esp. C. 33. Dig. L. L. 27. And Wood's Ins. 443, 2 Sess. C. 33. 12 Vin. Ab. 229. *Plunkett* v. *Cobbett*, 5 Esp. C. 186. Haw. P. C. c. 73. s. 10. Barnard, K. B. 208.

(*h*) *R.* v. *Dodd*, 2 Sess. C. 33. Dig. L. L. 27; supra note (*f*) for the law presumes that the master is acquainted with what his servant does in the course of his business. And see *R.* v. *Nutt*, Barnard, K. B. 308. Fitzg. 47. Dig. L. L. 27.

dant may rebut the presumption, by evidence that the libel was sold contrary to his orders, or clandestinely; or that some deceit or surprise was practised on him (*i*); or that he was absent under circumstances which entirely negative any presumption of privity or connivance (*k*).

Where in an action for a libel it appeared that the libel was written in the hand of the daughter of the defendant (a minor), who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence to go to the jury of a publication by the defendant, since this was not an act within the scope of the defendant's authority (*l*).

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant, and the con-

(*i*) See the observations of Aston, J. in *R.* v. *Almon*, 5 Burr. 2686. Supra, note (*f*).

(*k*) As when a printer is confined in prison to which his servants have no access, and they publish a libel without his privity. *Woodfall's* case. Leach's ed. of Haw. b. 1. c. 73. s. 10, note (3).

(*l*) *Harding* v. *Greening*, 1 Moore, 477.

sequent publication (*n*). And if a letter be sent by the post it is a publication by the defendant in any county to which the letter is in consequence sent (*o*).

Where the defendant has admitted that he is the author of a particular book, errors excepted, it is incumbent upon him to prove that the errors so excepted are material (*p*).

In the case of libel, as well as in all others, whether civil or criminal, presumptive evidence must be resorted to in failure of direct and positive testimony; and the same reasonable inferences and presumptions are to be made by the juries as in all other instances.

In criminal cases it is always, and in civil cases it is in some instances, necessary to prove a publication within the particular county. It seems that whenever the publication of a libel has once been authorized, by the defendant, he is guilty of a publication in whatever county the libel shall afterwards be in consequence published (*q*). Where the writer of a libel sent it

(*n*) *R.* v. *Johnson*, 7 East, 65. *R.* v. *Dodd*, 2 Sess. C. 33. Bac. Ab. tit. *Libel*, 497. Wood's Ins. 445.

(*o*) *R.* v. *Watson*, 1 Camp. 215. infra. p. 36.

(*p*) *R.* v. *Hall*, Str. 416.

(*q*) B. N. P. 6. *R.* v. *Johnson*, 7 East, 65. If *A.* send a libel to London to be printed and published, it is his act in

by the post, directed to A. B. in the county B. and it was in consequence sent into the county

London, if the publication be there. *R.* v. *Middleton*, Str. 77. In the case of the *King* v. *the Honourable Robert Johnson*, 7 East, 65, the defendant was indicted in the county of Middlesex for having published a libel in Cobbett's Weekly Register. Mr. Cobbett, the publisher of the Register, proved that he had received an anonymous letter (the original of which he believed to be destroyed,) in the same hand-writing as the libels which he afterwards received; in which letter (parol evidence of which was admitted to be given for this purpose,) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication, in his Register, certain information of public affairs in Ireland, and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the Register, Mr. Cobbett, through the medium of the same Register, requested the promised information to be directed to Mr. Budd, No. 100, Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his Register, where letters of communication were addressed to him, and from whence he received them, his own house being in Duke-street, Westminster. After this intimation, Mr. Cobbett received, in due time, two several letters, containing different parts of the libels in question, both in the same hand-writing with the letter previously received. Both the letters came under cover, but the covers were believed either to be destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted, to prove that they had the Irish post-mark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 29th October, 1803, was received, and the cover

B. and from thence sent by the post to A. B. in the county M. where A. B. received it, and read

opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett in Duke-street, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett received the next letter, which came to Mr. Budd, by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbett, swore to their belief of their being the hand-writing of the defendant, who, at the period in question, was an Irish judge. It was then proposed, by the attorney-general, that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. Cobbett, for the purpose of being published in his Register.

But the reading was objected to, upon the ground that there was no evidence to go to the jury, of a publication *by the defendant* in Middlesex. That, admitting the libels to be in the hand-writing of the defendant, there was no evidence to show that he had sent them into Middlesex to be there published, nor any privity established between himself and Cobbett. The case of the *Seven Bishops* was quoted as in point; and it was contended, that if any publication, proved to have taken place in Middlesex, was sufficient grounnd for the reading of the libel there, it ought to have been read in that case, since the petition, which had been acknowledged to have been signed by them, was found in the king's hands in Middlesex; and that the only link there wanting was, that it came there by the agency of the Bishops, which was holden not to be supplied by the evidence of their acknowledgment of their hand-writing, in that county. The trial was at bar, before Lord

it, it was held to be a publication in the county M. (*r*).

If the libel be dated of a particular place, the date is evidence that it was written there (*s*). It has been said, that the post-mark upon a letter is not *primâ facie* evidence to prove that a letter has been put into the post-office at the place denoted by the post-mark (*t*); it seems, however, from a later authority, that the post-mark is a fact

Ellenborough, C. J. and Grose, Lawrence, and Le Blanc, justices.

But it was answered by the court, that the case of the *Seven Bishops* was irrelevant; that it had been soundly ruled in their case, that the confession of their signatures, extorted from them as it was, did not amount to evidence of a publication in Middlesex; that, in the present case, a publication in Middlesex had been proved by Mr. Cobbett, and that the notification by letter to him, that he should receive certain papers for the purpose of publication, the public answer in the Register appointing the mode of sending, and the consequent receipt of papers by Cobbett, through that channel, answering the description of those proposed to be sent, and proved to have been written by the defendant, afforded evidence to go to a jury to decide, whether the publication in Middlesex had not been made through the defendant's procurement. The jury found the defendant guilty.

(*r*) *R.* v. *Watson*, 1 Camp. 215; and see *R.* v. *Girdwood*, East's P. C. 1116. 1120.

(*s*) *R.* v. *Burdett*, 4 B. & A. 95.

(*t*) *R.* v. *Watson*, 1 Camp. 215. But the defendant was found guilty of another publication.

admissible in evidence, when corroborated by other circumstances (*u*).

A general confession that the defendant was the *writer* of a libel, does not amount to an admission that he *published* it, still less is it a confession that he published it in any particular county (*x*).

A late case upon this subject excited much interest, and occasioned much legal investigation and discussion. The points were shortly as follow. The information charged the defendant with composing, writing, and publishing a libel in Leicestershire; A. stated that he received the libel, which was in the hand-writing of the defendant, from

(*u*) *R.* v. *Johnson*, 7 East, 65; note, that in this case the post-mark seems to have been perfectly immaterial; but, upon principle, there seems to be little doubt that a post-mark upon a letter, in the hand-writing of a defendant, and received through the medium of the post, is evidence, as a circumstance arising in the usual course and routine of business. See *Fletcher* v. *Braddyll*, 3 Starkie's C. 64.

(*x*) The *Seven Bishops'* case, 4 St. Tr. 304. 4 Jac. II. where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And see the observations upon this case by Ld. Ellenborough, C. J. and Lawrence, J. in *R.* v. *Johnson*, 7 East, 65; and *R.* v. *Burdett*, 4 B. & A.

B. on the 24th of August (*y*), it was contained in an envelope, which had been destroyed, but which, to the best of the witness's recollection, was addressed to B. who was the professional friend of the defendant; there was no trace of any seal, either on the envelope or paper. The paper was dated Kirby Park, August the 22d. Kirby Park (the defendant's seat) being situate in Leicestershire, 100 miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leicester, near Kirby Park, on the 22d and on the 23d of August, and there was no evidence of his having left the county of Leicester till after the publication (*z*) of the paper, which took place on the 25th; the only words, either on the paper or envelope, besides the libel, were "forward this to A." (the witness). The paper was addressed to the electors of Westminster; and A. had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. A. having been required to give up the author, the defendant wrote a letter admitting that he was the author.

(*y*) A. did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

(*z*) *i. e.* in the public newspapers.

No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the Court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a *publication* in *Leicestershire*. The learned judge left it to the jury to say, whether there had been a publication in Leicestershire, by an open delivery of the libel. The question and the principles relating to it, were discussed, on the motion for a new trial, with all the aid which talent, learning, experience, and unwearied diligence could supply. The ultimate, although it seems not the unanimous, decision of the court was, that the evidence was sufficient to warrant the conviction (*a*).

(*a*) *R.* v. *Sir Francis Burdett*, Bart. 4 B. & A. 717. The judges delivered their opinions *seriatim*. Best, J. was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post, from that county, amounted to a publication. *R.* v. *Watson*, 1 Camp. 215. *R.* v. *Williams*, 2 Camp. 505, Codex, Lib. 9. tit. 36; and see *Girdwood*'s case, East's P. C. 1116. 1120.

Holroyd, J. was of opinion, that the composing and writing a libel in the county of L. and afterwards publishing it, although the publication was not within the county of L., was an offence sufficiently charged as a substantive offence in the information, and which gave jurisdiction to a jury of the county of L. (see *R.* v. *Beere*, 2 Salk. 417. Carth. 409.

Some proofs are to be noticed which apply particularly to the proprietors and publishers of newspapers. Upon an indictment for a libel,

Holt's R. 422. *R.* v. *Knell*, Barnard, K. B. 305. *R.* v. *Carter*, 9 St. Tr.) and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor; and that a jury of the county of L. might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in the county of L. And that, in the case of an aggregate charge, part of which, being in itself a substantive misdemeanor, is committed within a particular county, the jury may inquire into the remainder, although done elsewhere; that there was reasonable evidence of a publication in L.; and that a *delivery* of a libel within the county, although it be sealed, is a publication in law.

Bayley, J. was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in L., considering that positive proof might have been given by calling B. as a witness. He gave no opinion on the question, whether a close delivery amounted to a publication. He held, that the whole *corpus delicti* must be proved within one county; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question, whether the composing a writing, with intent to publish, constituted an offence.

Abbott, L. C. J. intimated his opinion, that mere *delivery* constituted a publication. He held that the facts warranted the conclusion that the paper had been delivered by the defendant in L., to B., in the state in which it had been delivered by the latter to A. That, even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor, compounded of distinct

published in a newspaper called the World, proof that the paper was sold at the defendant's office, and that he *as proprietor* had given a bond to the stamp-office, as required by the stat. 29 Geo. III. c. 10. s. 10. for securing the duties on advertisements, and that he had from time to time applied to the stamp-office respecting the duties, was held to be strong evidence to prove a publication by him (*b*).

Hart and *White*, the printer and proprietor of a newspaper called "The Independent Whig (*c*)," were indicted, in London, for a libel published in that paper.

The prosecutor gave in evidence the affidavits sworn by the defendants, according to the stat. 38 G. 3. c. 78 (*d*), with their hands-writing

parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L. where one of those acts had been done.

(*b*) *R.* v. *Topham*, 4 T. R. 126.

(*c*) 10 East, 94.

(*d*) By sect. 1, no person shall print or publish any newspaper until certain affidavits, or affirmations, &c. shall have been delivered to the commissioners of stamps, &c.

By sect. 2, these must contain a true description of the printers, publishers, and proprietors, or of two of them, and of their places of abode; of the proprietors' shares in the paper, and the house in which it is intended to be printed, and of its title.

By sect. 9, all such affidavits and affirmations, or copies

thereto, and delivered to the commissioners, containing all the particulars required by the act,

thereof, certified to be true copies according to the act, shall, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations, as are hereby required to be therein set forth, against every person who shall have signed, sworn, or affirmed such affidavits or affirmations; and shall also be received and admitted, in like manner, as sufficient evidence of the truth of all such matters, against all and every person who shall not have signed or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper, or other paper, unless the contrary shall be satisfactorily proved. The section then contains an exception in favour of such as have, before the publication of the paper in question, delivered in to the commissioner an affidavit, &c. stating that they have ceased to be the printers, &c. of such paper.

By the 10th section, in some part of every newspaper, &c. shall be printed the names, additions, and places of abode of the printers and publishers, and of the place where the same is printed.

By sect. 11, it shall not be necessary, after any such affidavit, &c. or a certified copy thereof, shall have been produced in evidence as aforesaid, against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same

and, amongst the rest, the description of the place where the newspaper was printed, which

manner as the newspaper, or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing, mentioned in such affidavit or affirmation, for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop, or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves, or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.

By sect. 13, it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.

By sect. 14, in order to prevent the inconvenience which might result from requiring the personal attendance of the commissioners, it is enacted, that a certificated copy of any affidavit or affirmation, proved to be signed by the person who has the custody of the original, shall, without proof that he is a commissioner or officer, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and that such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation of which they purport to be copies have been sworn or affirmed according to this act; and shall have the same effect in evi-

was in London. An officer from the Stamp Office, (which is not in London) produced a newspaper, without stating from whence it came, containing the libel in question, which newspaper answered the whole description contained in the affidavit, and stated, at the foot of it, that it was printed at No. 33, Warwick-lane, London; and

dence as the originals would have had in case they had been produced and proved to have been duly so certified, sworn, and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.

By the 17th section, it is enacted, that every printer or publisher of any newspaper, or other such paper, shall within six days, deliver to the commissioners, or their officer, one of the papers so published, signed by the printer or publisher in his hand-writing, with his name and place of abode; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of £100; and that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such commissioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security at his own expense, for returning the same; and that in case such commissioner or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do.

it was also proved that the defendant's printing-house was at the same place.

The defendants were found guilty, but a new trial was afterwards moved for, on the ground that the evidence at the trial was insufficient to prove a publication in London; that the 9th clause of the act cited made the affidavit evidence of nothing more than the matters contained therein, which, by reference to the second clause, are the names, additions, descriptions, and places of abode of the printers, publishers, and proprietors, the description of the printing-house, and title of the paper; that it was still necessary to prove a publication in the county where the trial was had, since the paper, though printed in one place, may be published in another; that the 11th section is confined to actions or informations for penalties given by the act; that the object of the 17th clause was to fix the printing and publication upon the parties described in the stamp-office documents, by comparing the newspaper so delivered with any other of the same impression published in the county where the trial is had; but that a publication to the commissioners, under the direction of the act, could not be considered as a libellous and guilty publication, without any other evidence of publication in the same place; that, besides, the newspaper was only produced by an

officer from the stamp-office, without any proof how it came there, or from whom it was received.

The court were satisfied that the evidence of a publication in London was sufficient (*e*), on the ground that "the act requiring an affidavit to be made by the printers, proprietors, and publishers, specifying their names and places of abode," &c. makes the affidavit conclusive as to the several facts contained in it, as against the persons signing it, unless they ceased to be printers before the publication complained of. That had the act stopped here, the affidavits would be conclusive that one of the defendants was the printer and publisher, and the other the proprietor of the paper so intituled; and that it was printed at the place therein described, which is within the city of London, that would have put them upon shewing that the paper produced was a fabrication. But the 11th section goes further, and enacts, that proof of the affidavit shall render it unnecessary to prove that a newspaper corresponding in title, &c. with the one described in the affidavit, and to which the trial relates, was purchased at any house, &c. belonging to or occupied by the defendants, their servants, &c. or where they usually carry on the business of printing or pub-

(*e*) Lord Ellenborough, C. J. gave no opinion.

lishing such paper, or where the same is usually sold.

That, at all events, the 11th section superseded the necessity of further proof, since the words of it, plaintiff, informer, prosecutor, &c. were general, and not confined to informants seeking to recover penalties.

Where the defendant, having exhibited a libellous paper, retains it in his possession, if, after notice to produce it, he refuse, parol evidence may be given of its contents, and that even in cases of treason (*f*); and a printer may prove that he received a libel in manuscript from the defendant, and returned it to him (*g*).

To prove (*h*) the publication of a newspaper, an unstamped copy may be given in evidence, and the witness may swear, that similar papers were published.

A delivery of a newspaper, according to the provisions of the stat. 38 G. 3. c. 78. to the officer of a stamp-office, is a sufficient publication, though it is directed by the statute, for the officer has an opportunity of reading it (*i*).

Where the libel has been published in a foreign

(*f*) See *Le Merchant*'s case, 2 T. R. 201. *Layer*'s case, 6 St. T. 229.

(*g*) *R.* v. *Pearce, Peake*'s Cas. 75.

(*h*) Ibid.

(*i*) *R.* v. *Amphlitt*, 4 B. & C. 35.

language, it must be shown, by means of a sworn interpreter, that the translation set out in the declaration is a correct one(*k*). Where an indictment charges the defendant with composing, printing, and publishing a libel, he may be found guilty of the printing and publishing, or of the publishing only (*l*).

Where a governor of a British colony has made communications to the attorney-general of the colony as such, he is not bound to reveal them in an action against the former (*n*). So it has been held to be optional, on the part of a barrister, whether he will disclose what passed in court upon his making a motion for a criminal information (*o*). According to the general rule of law, that a witness is not bound to criminate himself, no witness is bound to answer a question, where the answer may tend to shew that he has been guilty of publishing a libel, for which he may be indicted (*p*).

Next, as to proof of the colloquium or innuendos.—Having proved the act of speaking the words, or publishing the libel, the next step is to

(*k*) Supra. Vol. I. p. 368.

(*l*) *R.* v. *Williams*, 2 Camp. 506. *R.* v. *Hunt*, ib. 583. 2 East's P. C. 515, 6.

(*n*) *Wyatt* v. *Gore*, Holt's C. 299.

(*o*) Per Eyre, C. J. 1 Esp. C. 456.

(*p*) *Molony* v. *Bartley*, 3 Camp. C. 210.; supra, vol. 1, p. 251.; and see Starkie on Evidence, pt. iv. 1740.

prove their application to the plaintiff, and to the extrinsic matters whose existence is alleged in the introductory part of the declaration or indictment, where the illegality of the words or libel depends upon their application to such extrinsic facts. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant, as alleged in the declaration or indictment. As such evidence is simply as to a result or conclusion which the witness may have derived from a great variety of circumstances, it is sufficient if, in the first instance, he state his belief and opinion as to the defendant's meaning generally, without disclosing his reasons, leaving it to the defendant, if he think proper, to inquire as to the means and grounds which the witness had for forming that conclusion.

The meaning of the defendant, as averred by an innuendo, is a question of fact, to be decided by the jury (*q*).

Where the words are spoken in a foreign language, or where the terms are ambiguous, and it is doubtful in what sense the speaker intended

(*q*) Per Lord Ellenborough, C. J. in *Roberts* v. *Camden*, 9 East, 96, Sir W. Blackstone. 2 W. Bl. 962, and Gould, J. in *Oldham* v. *Peake*, 2 W. Bl. 959. Cowp. 278. and see *Penfold* v. *Westcote*, 2 N. R. 335.

them, the question is, in what sense the hearers understood them; and if, where words may have two meanings, the hearers understood them in an actionable sense, the action is maintainable; for the slander and damage consist in the apprehension of the hearers (*r*). Where slander is published in a foreign language, it is necessary to shew that the hearers understood the language, for it will not be presumed that being ignorant of the words, they afterwards repeated them to those who understood them (*s*). But it seems that where the words are actionable in respect of extrinsic facts, as for instance, that they were spoken of the plaintiff in his character of an attorney, it is not essential to shew that the hearers knew the fact at the time of the speaking, for they may know it afterwards, and communicate the words to those who know it (*t*).

Next as to evidence of malice and intention.—It has been already observed, that where words have been uttered, or a libel has been published of the plaintiff, by which actual or presumptive damage has been occasioned, the malice of the defendant

(*r*) *Fleetwood* v. *Curley*, Hob. 267; for where slanderous words are spoken, which are wrong, the doers are answerable for all evil intents and damages. Ib.

(*s*) P. C. Hob. 268; and see 1 Vin. Ab. 507, and Gilb. Cas. L. & E. 117.

(*t*) P. C. *Fleetwood* v. *Curley*. Hob. 267.

is a mere inference of law from the very act, for the defendant must be presumed to have intended that which is the natural consequence of his act (*u*). In such instances, therefore, it is unnecessary to give evidence of malice in fact or actual malice, unless it may be by way of aggravating the damages. In other cases, the occasion and circumstances of the speaking and publishing repel the action, either peremptorily and absolutely, *or* unless express malice exist; and in this latter class of cases, where *actual malice* is essential to the action, it lies on the plaintiff to prove the fact. Where the burthen of proving express malice is thus thrown upon the plaintiff, he may give in evidence any expressions of the defendant, whether they be oral or written, which indicate spite and ill will, for the purpose of shewing the temper and disposition with which he made the publication complained of.

It has, however, been held, that other words or libels are not admissible evidence to shew the *quo animo*, unless they relate to the same subject. An action was brought for a libel published in a periodical work, called the Satirist, or Monthly Meteor, which stated *(inter alia)* that the plaintiff, being prosecuted by the attorney-general,

(*u*) *Prosser* v. *Bromage*, 4 B. & C. 247. supra, vol. 1. 220, *R.* v. *Harvey*, 2 B. & C. 258. supra, vol. 1, p. 215.

had fled the country, that he might save himself from the pillory. To prove the malicious motive of the defendant, the plaintiff's counsel proposed to read extracts from a subsequent number of the Satirist, but Sir J. Mansfield, C. J. rejected them all, except one, which had immediate reference to the former libel (*x*).

But it is to be remarked that, in this case, there was no doubt as to the animus; the publication was clearly libellous in itself, and the occasion of publishing did not render proof of malice in fact necessary. As nothing turned upon the defendant's real intention, the evidence was inadmissible; for it is perfectly clear that subsequent libels cannot be received in evidence, with a view to enhance the damages, for they are substantive and independent causes of action. And in the subsequent case of *Stuart* v. *Lovell* (*y*), where the publication declared on was clearly libellous, Lord Ellenborough, C. J. rejected evidence offered of the publication of subsequent libels, observing that such evidence would certainly be admissible to shew the intention of the defendant, were it at all *equivocal*, but that they were not admissible for

(*x*) *Finnerty* v. *Tipper*, 2 Camp. C. 72. His Lordship said you might as well give in evidence one highway robbery on the trial of another.

(*y*) 2 Starkie's C. 93.

the purpose of enhancing the damages. A case, therefore, of equivocal intention, as where the question depends on the existence of malice in fact, differs widely in this respect from one which admits of no doubt on the subject; where such a doubt exists, and where the material question in the cause is, whether the defendant was justified by the occasion, or acted from express malice, it seems, in principle, that any circumstances are admissible which can elucidate the transaction and enable the jury correctly to conclude whether the defendant acted fairly and honestly according to the occasion, or *malâ fide* and vindictively, for the purpose of causing evil consequences.

In an action for a malicious prosecution of an indictment for perjury, evidence was admitted of an advertisement published by the defendant pending the prosecution, although an information had been granted for publishing that advertisement (*z*).

In an action for words imputing perjury, the plaintiff was allowed to prove that, subsequently to the speaking of the words, the defendant had preferred an indictment against him (*a*). But in such cases the jury are not to consider the effect

(*z*) *Chambers* v. *Robinson*, Str. 691.

(*a*) *Tate* v. *Humphreys*, 2 Camp. 73. n. Cor. Graham, B. and afterwards by the court.

of such evidence in measuring the amount of the damages, but merely as a circumstance to prove malice (*b*).

It was once doubted whether, in admitting evidence of this nature, a distinction ought not to be made between words not actionable in themselves and those which are so. In the case of *Mead* v. *Daubigny* (*c*), Lord Kenyon rejected evidence of words actionable in themselves, and not mentioned in the declaration; but his lordship afterwards changed his opinion, and admitted such evidence in a subsequent case (*d*).

In *Russel* v. *Macquister* (*e*), evidence of actionable words spoken after the time of those laid in the declaration, was objected to, on the ground that if such words were taken into consideration, by the jury, the defendant might be made to pay a double compensation for the same

(*b*) 2 Camp. C. 73.

(*c*) Peake's C. 125.

(*d*) *Lee* v. *Huson*, Peake's C. 166. *R.* v. *Pearce*, ib. 75. In the case of *Warne* v. *Chadwell*, 2 Starkie's C. 457, the words (spoken of a tradesman) were, "He is a bankrupt and cannot pay five shillings in the pound; he is not fit to be trusted;" and the plaintiff was allowed to prove that on another occasion the defendant had said that the plaintiff had called his creditors together and had offered them a composition of five shillings in the pound.

(*e*) 1 Camp. 49.

injury, since another action might be brought for the words last spoken, and the distinction was taken between that case and the case of words not actionable. But Lord Ellenborough, C. J. overruled the objection, observing, that though such a distinction had once prevailed, it was not founded in principle; and that, although no evidence can be given of any special damage not laid in the declaration, yet that any words, or any act of the defendant, is admissible, to shew *quo animo* he spoke the words which are the subject of the action.

Upon the same principle (*f*), where a libel was contained in a political paper published weekly by the defendant, after proof that the paper in question had been purchased at the defendant's office, evidence was admitted of the previous sale of other papers with the same title at the same office; and the reason of admitting it was, to shew that the papers, which purported to be weekly publications of public transactions, were sold deliberately, and vended in the regular course of circulation; that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal.

In an action where any words, or other libels,

(*f*) *Plunkett* v. *Cobbett*, 5 Esp. C. 136.

not specified in the declaration, are offered in evidence, the defendant is at liberty to prove the truth of the charges or imputations which they contain, for he had no opportunity of pleading the truth in justification (*g*).

It has already been seen that, to support an action by a servant against a former master, for slander in giving his character, the plaintiff must prove that the character was both falsely and maliciously given (*h*).

In such instances the plaintiff, if charged with dishonesty and misconduct in the defendant's service, is at liberty to prove his good character and conduct in former services, since general character is in some respects in issue; so the plaintiff may prove, by the evidence of other servants in the same family, that, whilst he remained in the defendant's service, he conducted himself well, and that no complaints of the nature ascribed to him by the defendant then existed (*i*). And the tendency and bearing of this evidence is to shew, that the defendant *knew* that the character which he gave was false: the plain reason for this is, that the knowledge of misconduct frequently rests with the defendant himself; and, being unable to

(*g*) See *Stuart* v. *Lovell*, 2 Starkie's C. 93. *Warne* v. *Chadwell*, 2 Starkie's C. 457.

(*h*) Supra, v. 1. p. 294.

(*i*) 3 B. & P. 589.

prove it by the testimony of others, if the general presumption were to operate against him, he would be left without defence. To prevent such inconvenience, the law requires malice to be proved from other sources. In case, however, the plaintiff should be able expressly to prove that the defendant was aware of the falsity, no further proof of malice would be requisite; nor, indeed, could stronger proof of it be adduced than that the defendant had given a character of the plaintiff injurious to his reputation, with a full knowledge that it was untrue.

The circumstances under which the master and servant parted, any expressions of ill-will uttered by the former, his officiously acquainting others with the servant's misconduct, without any previous application to him for a character, are all facts which are proper for the consideration of a jury to enable them to form their opinion upon the question of intention.

The plaintiff cannot in ordinary cases, where no justification is pleaded, adduce evidence of the falsity of the charge, either to shew malice or to enhance the damages (*k*); for, unless the defendant shew that he was justified by the occasion, malice will be inferred, and therefore need not be proved; and, in the absence of express allegations and proof of the plaintiff's guilt, his innocence

(*k*) *Stuart* v. *Lovell*, 2 Starkie's C. 93.

will be presumed (*l*). It has even been said, that although the defendant had pleaded a justification, charging the plaintiff with having stolen money from the defendant, the plaintiff could not give general evidence of good character (*m*).

(*l*) But as the defendant's knowledge that the charge was untrue, where he sought to protect himself under colour of the occasion of speaking or writing, would be conclusive evidence to overturn the defence, it would, as it seems, be admissible for that purpose.

(*m*) *Cornwall* v. *Richardson*, 1 R. & M. 305. Cor. Abbott, L. C. J. It appears, however, from the report of this case that his lordship interposed rather in favour of the plaintiff, in cautioning his counsel that, if such evidence were received, it would afford the defendant an opportunity of giving general evidence to the contrary, than that he expressly ruled the point. The plaintiff, it seems, where a justification is pleaded, is at liberty to go into the whole of his case, and therefore may, it should seem, in principle, adduce any evidence which tends to prove it; but, as he is not allowed to prove a particular issue by piecemeal, it is probable that, if he gave evidence of good character, in anticipation of the defendant's case, in justification, he would not be allowed afterwards to go into a general case, by way of reply to the defendant's evidence. See *Pierepoint* v. *Shapland*, 1 Car. & P. 448; and, therefore, where there is reason to apprehend that the defendant intends to rely on such a justification in evidence, and the plaintiff has proof in answer, it would be impolitic and dangerous to adduce any part of it by way of anticipation. In the case of *King* v. *Waring and Ux.* 5 Esp. C. 13, evidence of the plaintiff's previous good character, as a servant, was admitted; but there the action was brought against a former mistress, and the alleged libel was written in

Where the inference of malice and ill-will, arising from the very nature of the words or libel, is not repelled by the occasion and circumstances of the speaking or publishing, no evidence of malice is of course expected from the plaintiff; and any overt act of publication imposes the burthen of explanation upon the defendant, since it will be presumed that the party knew the contents of that which he published. Thus it has been seen, that a bookseller is, in the first instance, presumed to know the contents of any book sold at his shop, and on proof of the sale, the contents are so far considered to have been fixed upon him, that the plaintiff is entitled to have them read in evidence. So far has this species of presumption been carried, that it has been held that, upon an indictment for sending a threatening letter, the bare delivery of it, though sealed, was *primâ facie* evidence of a guilty knowledge of its contents (*n*).

a letter, in which the defendant, professing to give the plaintiff's character, charged her with dishonesty and misconduct; and, in such a case, the falsity of the imputation and express malice are essential to the action. The general rule seems to be, that evidence of good character is not receivable until it has been impeached. See Starkie on Evidence, pt. iv. 367, 869, 917, 1310. But whilst the plea of justification stands on the record, the plaintiff's character is, as it seems, in question.

(*n*) *R.* v. *Girdwood*, Leach, C. C. L. 169.

Where special damage is essential to the action the plaintiff must prove it according to the allegations in his declaration (*o*). It must be shewn that the damage alleged and proposed to be proved, was the natural and immediate consequence of the slander. The general rule is, that no evidence of special damage is admissible, unless it be averred in the declaration, whether special damage be the gist of the action, or be used as matter of aggravation, the words being in themselves actionable (*p*). But it has been said, that greater certainty is requisite, where the special damage is the gist of the action, than where it is merely laid by way of aggravation (*q*).

Where the damage consists in loss of marriage, the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss (*r*). So if he allege loss of marriage with M. N., he

(*o*) Supra, v. 1. p. 439.

(*p*) B. N. P. 7. 1 Will. Saund. 243. n. 5. It was formerly held, that where special damage was the gist of the action, such special damage might be given in evidence, although the particular instances were not specified, otherwise where the words were actionable. Str. 666.

(*q*) Per Cur. in *Wetherell* v. *Clerkson*, 12 Mod. 597. 2 Lutw. 1295. See *Clarke* v. *Periam*, 2 Atk. 33. Supra, vol. 1. p. 239.

(*r*) *Barnes* v. *Prudling*, 1 Sid. 396. 1 Vent. 4. *Hunt* v. *Jones*, Cro. J. 499. 12 Mod. 597.

cannot give damage in evidence loss of marriage with any other person (*s*).

In an action for slander, by which the plaintiff has lost his customers, he cannot give in evidence the loss of any whose names are not specified in the declaration (*t*). But where it is alleged, as special damage, that the plaintiff was prevented from selling his estate, and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders is not specified; for the loss is the preventing of the sale (*u*), and proof that persons would have purchased is evidence of such prevention.

Where the plaintiff alleged that he had been employed, from time to time, to preach to a congregation of dissenters, and that, by reason of the words the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the court, after a verdict for the plaintiff, on motion in arrest of judgment, held that the allegation of damage was sufficient; for he could not have

(*s*) Lord Raym. 1007.

(*t*) 8 T. R. 130.

(*u*) See *Snead* v. *Badley*, Cro. J. 397, Sir W. Jones, 196.

stated the names of all his congregation (*x*). In such a case, therefore, it should seem that general evidence of the loss of emolument would be admissible.

Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts, but that they could not be asked whether particular persons had not given up their boxes (*y*).

The plaintiff must also prove that the damage was the consequence of the defendant's act.

The connection between the wrong done by the defendant and the loss to the plaintiff is matter of evidence.

It is nevertheless a rule of law that the damage must be the natural and immediate consequence of the wrongful act. The defendant asserted that the plaintiff had cut his master's cordage, upon which the master had discharged the plaintiff from his service, although he was under an engagement to employ him for a term; but the court held that the discharge was not a ground of action, since it was not the natural consequence

(*x*) *Hartley* v. *Herring*, 8 T. R. 130.
(*y*) *Ashley* v. *Harrison*, 1 Esp. C. 48.

of the words spoken (*z*); the damage must be attributable wholly to the words.

Where the reason which a party assigned for not employing the plaintiff was founded *partly* on the defendant's words and partly on the circumstance that he had been previously discharged by another master, it was held that no action was maintainable (*a*). Where the refusal of a third person to deal with the plaintiff in the way of his trade, is alleged as special damages, evidence is not admissible of the reason given by the customer to the the plaintiff's agent for ceasing to deal; the customer himself must be called to prove his motive (*b*).

Where the defendant libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged, as special damage, that his oratorios had, in consequence, been more thinly attended, it was held by the judge, on the trial, that the injury was too remote (*c*), and that it did not

(*z*) *Vicars* v. *Wilcocks*, 8 East, 1; and see *Morris* v. *Langdale*, 2 B. & P. 184, where it was doubted whether the occasioning a third person to break his contract with the plaintiff was a sufficient special damage, since the plaintiff might obtain satisfaction, by action, for the breach of contract; and vide supra, vol. 1, p. 204.

(*a*) 8 East, 1.

(*b*) *Tilk* v. *Parsons*, 2 C. & P. 201. Cor. Best, C. J.

(*c*) Lord Kenyon, *Ashley* v. *Harrison*, 1 Esp. C. 48.

appear but that the refusal to perform arose from caprice or indolence.

The plaintiff, having once recovered damages, cannot afterwards recover any ulterior compensation for any loss resulting from the same words (*c*).

It has been said that the plaintiff, in an action for a malicious prosecution, may give in evidence the circumstances of the defendant, in order to increase the damages. The principle, however, upon which such evidence is allowable, is not very obvious, and scarcely can be warranted, unless the situation and rank of the defendant have affected the quantum of prejudice sustained by the plaintiff.

Where the words or libel are in themselves actionable, no proof of special damage is necessary, although such special damage should be alleged. But the plaintiff cannot in that case, any more than where the special damage is the gist of the action, give evidence of any consequential damage, which is not alleged in the declaration.

Where, in addition to the general issue, issues are joined on affirmative pleas of justification, the plaintiff's counsel may either in the first instance rebut the justification, or he may wait till the defendant has offered affirmative evidence

(*c*) B. N. P. 7.

in proof of his justification, but he cannot divide his proof by giving part in evidence in the first instance and part afterwards (*d*).

Where the defendant has suffered judgment by default, it is not incumbent on the plaintiff to adduce any evidence on the execution of the writ of inquiry to assess the damages.

The proofs in an action for a *malicious prosecution* are, 1st, Of the prosecution; 2ndly, Of the defendant's malice, and the want of probable cause; 3dly, Of damage to the plaintiff.

1st. A *prosecution* by the *defendant*, from which the plaintiff has been *discharged*. If the prosecution was in the King's Bench, at the assizes, or quarter sessions, the fact of prosecution and acquittal must be proved in the usual way, by the production of the record, or proof of an examined copy of it (*e*). It is no objection to this proof, that no order of court, or fiat of the attorney-general, allowing a copy of it to the party acquitted in a case of felony, is proved (*f*)

(*d*) *Brown* v. *Murray*, 1 R. & M. 254. *Sylvester* v. *Hall*, ib. See *Rees* v. *Smith*, 2 Starkie's C. 31. *Delauny* v. *Mitchell*, 1 Starkie's C. 439. *Spooner* v. *Gardiner*, 1 R. & M. 86. *Pierrepoint* v. *Shapland*, 1 Carr. & P. 448.

(*e*) See *Clayton* v. *Nelson*, B. N. P. 13. *Kirk* v. *French*, 1 Esp. C. 81. *Morrison* v. *Kelly*, 1 Bl. R. 385. Satrkie on Evidence tit. Malicious Prosecution.

(*f*) *Leygatt* v. *Tollervey*, 14 East, 302. *Jordan* v. *Lewis*, 2 Str. 1122. And Ford's MS. The case of *Leg-*

It must appear that the plaintiff was *acquitted* of the charge (*g*) ; it is not sufficient to prove that the proceeding was stayed by the *nolle prosequi* of the attorney-general (*h*) ; otherwise if he had pleaded not guilty, and the attorney-general had confessed it (*i*) ; and it is sufficient that the

gett v. *Tollervey*, above cited, overruled that of *Guinn* v. *Phillips*, Monmouth summer assizes, 1763, where Adams, B. held, that a copy of the record in felony ought not to be received, unless it had been ordered by the judge (see Selw. N. P. 1063). But he held that, in all cases of indictments for misdemeanors, a defendant is entitled to a copy of the record. And the same distinction was taken by Lord Mansfield, C. J. in *Morrison* v. *Kelly*, 1 Bl. R. 385, where the prosecution, however, had been for a misdemeanor. Among the orders and directions to be observed by justices of the peace, at the Old Bailey, 2 G. c. 2. prefixed to Kelyng's Crown Cases, is one which directs " that no copy of any indictment for felony be given without special order, or motion made in the open court, at the general gaol delivery; because the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the king upon just occasions."

(*g*) *Hunter* v. *French*, Willes, 517.

(*h*) *Goddard* v. *Smith*, 6 Mod. 262; for, notwithstanding the *nolle prosequi*, fresh process may be sued out upon the indictment. Ibid. per Ld. Holt; but it was said that there had been no instance of any further proceeding after a *nolle prosequi*. Ibid. S. C. Salk. 21. Note that the declaration alleged an *acquittal*, but the court held that the entry of a *nolle prosequi*, did not amount to an *acquittal*.

(*i*) Ibid.

party was acquitted upon a defect in the indictmen (*k*).

Some proof ought to be given of the identity of the plaintiff with the party prosecuted. In order to prove that the defendant was the prosecutor, it may be desirable to be prepared with the original bill of indictment, for although the names of the witnesses on the back of the bill are no part of the record, it is evidence that they were sworn to the bill (*l*); but it may be proved that the defendant was a witness, without producing the bill (*m*); and the indorsement of the party's name as a witness on the bill is no evidence that he was the prosecutor (*n*). Where the defendant merely acted as a magistrate, the

(*k*) *Wicks* v. *Fentham*, 4 T. R. 247.

(*l*) Per Holt, C. J. in *Johnson & Ux.* v. *Browning*, 6 Mod. 216.

(*m*) Ibid. per Ld. Holt.

(*n*) 1 Vent. 47. B. N. P. 14. It is a question of fact for the jury to determine, who was the prosecutor. Ld. Ellenborough, C. J. in *R.* v. *Cromwell*, 4 M. & S. 207, observed, that "in an action for a malicious prosecution, if the prosecutor be kept out of sight, it sometimes becomes a point of very subtle evidence to determine who is the prosecutor; but *id certum est quod certum reddi potest;* and it is a question to be ascertained by inquiry and evidence." See also *R.* v. *Smith*, 1 Burr. 54. *R.* v. *Kettleworth*, 5 T. R. 33. in neither of which was the prosecutor's name in the indictment. Sometimes it is the business of the court to make the inquiry. Ib. and *R.* v. *Incledon*, 1 M. & S. 268.

proof of his name on the back of the indictment, as prosecutor, will not render him liable (*o*). The proper evidence to establish this fact is, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution. It has been said, that a grand juror may be called to prove that the defendant was the prosecutor (*p*); this, however, appears to be doubtful.

Where the substance only of the charge contained in the judgment or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different (*q*).

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœnâ duces tecum*, to

(*o*) *Girlington* v. *Pitfield*, 1 Vent. 47.

(*p*) *Sykes* v. *Dunbar*, Selw. N. P. 1066. 7th ed. This evidence is said to have been admitted by Ld. Kenyon, on the ground that this was a question of fact, the disclosure of which did not involve a breach of the grand juryman's oath; but yet it seems, that either the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining, upon cross-examination, the grounds from which the witness drew his general inference that the defendant was the prosecutor.

(*q*) Supra. vol. 1. p. 446.

produce the proceedings (*r*). If the information was laid by the defendant, his taking the oath, and hand-writing, should be proved, as also the issuing the warrant to the constable, &c.; the warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant, and his ultimate discharge must also be shown.

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information (*s*).

2dly, *Malice and the want of probable cause.*—If a party prosecute another on a criminal charge, it is a rule of law, which seems to be founded upon principles of policy and convenience, that the prosecutor shall be protected in so doing, however malicious his private motives

(*r*) Where the declaration alleged an information before a magistrate, and evidence was offered of an admission by the defendant that he had laid an information before a magistrate, and it appeared from the evidence of the magistrate's clerk, that the practice was to take such information in writing, but no evidence was given of the information itself, the plaintiff was nonsuited. *Smith* v. *Walker*, Cor. Bayley, J. York summer assizes, 1821.

(*s*) *Newsam* v. *Carr*, 2 Starkie's C. 70. Cor. Wood, B. Note, it did not appear that any information had been taken, and yet it seems that it is to be presumed in a case of felony that one has been taken.

may have been, provided he had probable cause (*t*) for preferring the charge.

This protection appears to be not only one of convenience, but of justice, or even of necessity, when it is considered how often it happens that the facts upon which a prosecution is properly founded are confined to the knowledge of the prosecutor alone; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such a case be left exposed to an action, against which he might have no defence (*u*), if malice were to be inferred from the apparent want of probable cause.

(*t*) 1 T. R. 520. 1 Salk. 14, 15, 21; 5 Mod. 394. 405. 1 Vent. 86. Carth. 415. Where a party robbed or injured merely states actual facts to a magistrate, on which the latter acts according to his own discretion, the action it seems is not maintainable. The complainant cannot, in propriety, be said to be the prosecutor of the person against whom the magistrate may think fit to issue his warrant; and whether there be or be not probable cause for issuing the warrant, there was, at all events, probable cause for making the statement, and no malice can be inferred from a mere statement of facts according to the truth. Where the defendant went before a magistrate, and stated the fact of his having lost a bill of exchange, and the magistrate's clerk stated the substance, but added that the plaintiff had feloniously stolen the bill; there being no evidence of malice on the part of the defendant, it was held that the plaintiff had been properly nonsuited. *Cohen* v. *Morgan*, 6 D. & R. 8.

(*u*) See Ld. Kenyon's observations in *Sykes* v. *Dunbar*,

It has already been seen, that what will amount to probable cause, may be either a question of *law*, to be decided by the court on the particular facts, as found by the jury, or may be a conclusion or inference of fact to be drawn by the jury (*x*). Evidence of the most express malice will not dispense with proof of the absence of probable cause (*y*).

Where, upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned had been falsely sworn, but that there was no probable cause for some assignments of perjury,

1 Camp. 202, in note; and in *Smith* v. *Macdonald*, 3 Esp. C. 6. These reasons do not, as has been seen, apply to a case where a party makes an extra-judicial charge against another.

(*x*) Supra, vol. 1. p. 279. Where a felony has been committed, though not by the plaintiff, a private person may justify not only a prosecution, but even an actual arrest, if he acted on fair and reasonable grounds of suspicion. But in an action of trespass, it would be necessary that the defendant (not being a peace officer,) should plead specially the grounds on which he acted. See *Mure* v. *Kaye*, 4 Taunt. 34. *M'Cloughan* v. *Clayton*, 2 Starkie's C. 445. Haw. b. 2. c. 12. s. 15. In such cases, therefore, it may be a question of law for the court, whether the circumstances were sufficient to justify an arrest. No one who did not himself believe, on facts within his knowledge, that the party was guilty, would be justified in making an arrest. Haw. b. 2. c. 12. s. 15. *Sir Anthony Ashley's* case, 12 Co. 92.

(*y*) *Turner* v. *Turner*, 1 Gow. 50.

on some of the transactions contained in the affidavit, it was held that the action was maintainable (*y*), for there being no probable cause for some of the charges in the indictment, it was preferred without probable cause (*z*).

The fact of *malice*, which is a question for the jury (*a*), is usually inferred from the want of any

(*y*) *Reed* v. *Taylor*, 4 Taunt. 616.

(*z*) *Per* Gibbs, C. J. *Reed* v. *Taylor*, 4 Taunt. 616.

(*a*) See *Johnstone* v. *Sutton*, 1 T. R. 543. Yet there may be cases so circumstanced, that though the courts might not go so far as to infer malice in point of law, without the aid of a jury, yet they would leave it to the jury to imply malice. Where a bank inspector, in the absence of circumstances which would justify suspicion, charged the holder of a forged bank-note, which he had refused to give up to the inspector, with a felonious possession of the note, Ld. Ellenborough said, that to press for a commitment, under such circumstances, was such a *crassa ignorantia*, that it amounted to malice. *Brookes* v. *Warwick*, 2 Starkie's C. 389. See also *Isaacs* v. *Brand*, 2 Starkie's C. 167. Supra, vol. 1. p. 282, in the note. The defendant had held the plaintiff to bail, as administratrix, for a debt due from the estate; and upon the trial of the action, for maliciously holding to bail, the plaintiff relied wholly on the mere fact of her having been held to bail, when she was not liable to arrest, and gave no extrinsic evidence of malice. The jury having found a verdict for the plaintiff, with five shillings damages, the court, upon a motion for a new trial, doubted whether the very fact of holding the party to bail, under such circumstances, was not evidence from which malice was to be *implied*, and refused to disturb the verdict. *Fletcher* v. *Webb*, 11 Price, 381.

probable cause for the prosecution (*b*). No evidence of malice can be more cogent than the proof that the defendant *knew* that the plaintiff was innocent.

It is invariably necessary, in an action of this nature, to give some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge, for, as was observed in the case of *Purcell* v. *Macnamara* (*c*), the prosecution may have been commenced and abandoned from the purest and most laudable motives.

Thus it is not enough to show, that on an indictment of the plaintiff by the defendant for perjury, the former was acquitted upon the trial, on failure of the prosecutor's appearance when called (*d*); even although the facts lay within the defendant's knowledge, who, had there been

(*b*) *Incledon* v. *Berry*, 1 Camp. 403. *Saville* v. *Roberts*, 1 Salk. 14. Ld. Ray. 374.

(*c*) *Purcell* v. *Macnamara*, 9 East, 361. *Sykes* v. *Dunbar*, cited 9 East, 363, in the note, where Ld. Kenyon ruled, that it was not sufficient for the plaintiff to show his acquittal, without going farther, and giving evidence of malice in the defendant.

(*d*) Ibid.

the least foundation for the prosecution, might have proved it (*e*).

Or to prove that the bill was thrown out by the grand jury (*f*), or that the defendant, after

(*e*) The circumstance, that in the particular case the facts are peculiarly within the knowledge of the prosecutor, and the proof of them within his reach, would clearly be an insufficient reason for departing from the general rule, which seems to be founded partly on the difficulty under which a defendant must often labour, in proving by other witnesses the cause which he had for instituting the prosecution. In Buller's Nisi Prius, 14, it is laid down, that where the facts are in the knowledge of the defendant himself, he must show a probable cause, though the indictment has been found by a grand jury, or the plaintiff shall recover, without proof of express malice; for this position, the case of *Parrott* v. *Fishwick*, Lond. Sitt. after Trin. T. 1772, is referred to; but from the note of this case, given 9 East, 362, it appears that where a defendant had been acquitted by verdict, Ld. Mansfield, in summing up, said, "That it was not necessary to prove express malice; for if it *appeared* that there was no probable cause, that was sufficient to prove implied malice, which was all that was necessary to be proved to support this action. For in that case all the facts lay within the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power, and incumbent on him to prove it." Verdict for the plaintiff, damages 50*l*. It is observed by Mr. East, in the note referred to, that it was perfectly consistent with the summing up, that the plaintiff had given *primâ facie* evidence to negative any probable cause.

(*f*) *Byne* v. *Moore*, Marsh, 12.

charging the plaintiff on oath with an assault, omitted to prefer an indictment (*g*).

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by *malicious motives* in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient (*h*).

In an action against a magistrate for a malicious conviction, the question is not whether there was probable cause in fact for convicting, but whether *he* had any probable cause for convicting, and for this purpose, what passed before him upon the hearing is not only proper, but essential evidence with a view to the question of malice (*i*).

The proof of malice in this action (as has already been observed), usually results from the want of probable cause, which when once established affords the strongest presumption of malice (*k*). Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publi-

(*g*) *Wallace* v. *Alpine*, 2 Camp. 204.

(*h*) *Per* Le Blanc, J. *Incledon* v. *Berry*, 1 Camp. 203, in the note.

(*i*) *Burley* v. *Bethune*, 5 Taunt. 580.

(*k*) See 5 Taunt. 583.

cation of the proceedings, is properly adduced to prove malice (*l*). It seems also, that the plaintiff may give in evidence the proof adduced by defendant on the trial of the charge (*m*). So he may give in evidence publications by the defendant on the subject of the charge (*n*).

Where the defendant, a bank inspector, had procured the plaintiff, a tradesman, to be taken into custody on a charge of having in his possession a forged bank-note, without legal excuse, because he had refused, after paying the amount to the person to whom he had paid it away, to deliver it up to the inspector, Ld. Ellenborough held that the pressing a commitment, under such circumstances, was such *crassa ignorantia* that it amounted to malice (*o*).

(*l*) Str. 691.

(*m*) B. N. P. 13, 14.

(*n*) *Chambers* v. *Robinson*, Str. 691. where the plaintiff gave in evidence an advertisement published by the defendant pending the prosecution of an indictment for perjury, though an information had been granted; but the chief justice informed the jury that they were not to consider it in damages, but only as a circumstance of malice.

(*o*) *Brookes* v. *Warwick*, 2 Starkie's C. 389. The plaintiff had taken the note in the usual course of business, and paid it in the usual course to B. The note being stopped at the bank, was stamped as a forgery, and brought by an inspector to the plaintiff. The plaintiff paid the amount to B. and refused to give it up to the inspector, insisting on his right to retain it. The inspector, without any ground for suspicion, charged the

The defendant may give in evidence any facts which show that he had *probable cause* for prosecuting, and that he acted *boná fide* upon that ground of suspicion. It is no answer to the action that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted (*o*).

If it appear that the jury, upon the trial of the plaintiff, entertained doubts upon the evidence, and deliberated as to his guilt after the case was concluded, the fact is, it seems, evidence of a probable cause (*p*).

plaintiff with feloniously having the note in his possession, without lawful excuse. The case was very pertinaciously pressed on the part of the defendant, although Ld. Ellenborough had, early in the cause, expressed a strong opinion on the subject, and left it to the jury upon the ground of malice. The jury found for the plaintiff, damages £50.

(*o*) *Hewlett* v. *Crutchley*, 5 Taunt. 277.—Supra, vol. I. p. 281. note.

(*p*) In *Smith* v. *Macdonald*, 3 Esp. C. 7. Ld. Kenyon held, that if the jury paused before they acquitted the plaintiff upon his trial for the offence, he should hold that there was probable cause for the prosecution. It does not appear, whether in that case the evidence rested upon the testimony of the prosecutor, the defendant in the action. It is also to be observed, that there was no evidence to negative probable cause, a circumstance in itself sufficient to warrant a nonsuit. See also, *Lilnal* v. *Smallman*, Selw. 946. *Golding* v. *Crowle*, B. N. P. 14.

It is obviously of importance to prove that a felony has been committed (*q*), and to be prepared with proof of such circumstances as tend to throw suspicion on the plaintiff (*r*).—This, however, would probably be deemed to be insufficient in case of express proof that the defendant knew that the prosecution was without foundation.

In the case of *Johnson* v. *Browning* (*s*), where it appeared that no one was present at the time of the supposed robbery but the wife of the defendant in the action, Ld. Holt admitted evidence of what she swore at the trial of the indictment; but it is obvious that this was done under the impression that it was incumbent on the defendant to establish the fact of probable cause, although no evidence were given to establish the negative.

(*q*) In *Johnson* v. *Browning*, 6 Mod. 216. Ld. Holt seems to have considered this proof to be essential to the defence; but it seems to be a good defence to prove reasonable grounds for suspecting the guilt of the plaintiff, although no felony was committed. See *Samuel* v. *Payne*, Dougl. 345. *Ledwith* v. *Catchpole*, Cald. 291. Supra, 821.

(*r*) See *Knight* v. *Germain*, Cro. Eliz. 134. *Pain* v. *Rochester*, Cro. Eliz. 871.

(*s*) 6 Mod. 216. In B. N. P. 14, citing *Cobb* v. *Carr*, it is said, that the defendant's evidence of what he swore upon the trial of the indictment is evidence; this, however, does not seem to be warranted, for if the principle of *necessity* operated in such a case, the effect would be to admit the testimony of the defendant himself, by which means the plaintiff would have the benefit of a cross-examination.

Where the plaintiff has been arrested on a charge of larciny, it has been doubted whether the defendant, after having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character (*t*); but it seems that although such evidence affords no presumption of probable cause in the particular instance (*u*), yet that it is matter admissible in mitigation of damages.

3dly. *The damage sustained.*—The plaintiff may prove in aggravation of damages the length of imprisonment, his expenses, situation, and circumstances. The peril and jeopardy in which a man's life and liberty are placed by a malicious prosecution, or the prejudice to his fame and reputation, constitute a sufficient ground of action (*x*); so although neither his fame nor liberty be affected, if he has been put to needless ex-

(*t*) In the case of *Rodriguez* v. *Tadmire*, 2 Esp. C. 721, Lord Kenyon admitted general evidence to that effect. In *Newsam* v. *Carr*, 2 Starkie's C. 69. Cor. Wood, B. where a witness was asked whether the plaintiff's house had not been searched on former occasions, and whether he was not a man of suspicious character. Wood, B. over-ruled the question, observing, that in actions of slander such evidence would be admissible to mitigate the damages, but that in the present case it would afford no evidence of probable cause.

(*u*) Ibid.

(*x*) *Savil* v. *Roberts*, B. N. P. 13.

pense to defend himself (*y*). In the assessment of damages, the costs incurred by the plaintiff are to be estimated as between attorney and client (*z*).

If a man be falsely and maliciously indicted of a crime which is a scandal to him, and hurts his fame, an action lies, although the indictment be insufficient, or an ignoramus be found (*a*); for although no expense may have been incurred, the mischief of the slander has been effected (*b*).

A plaintiff cannot upon the trial object to the insufficiency of a plea of justification in point of law (*c*).

Upon the execution of a writ of inquiry, where the defendant in an action for slander has allowed judgment to go by default, it is not incumbent on the plaintiff to give any evidence. The jury, in the absence of evidence, are not confined to nominal damages (*d*).

A member of parliament may be called upon

(*y*) B. N. P. 14. This was formerly doubted, *ibid.* But it has been decided, that such an action lies by the husband for the expense of defending his wife, B. N. P. 13. *Jones* v. *Gwynn*, 10 Mod. 214; 1 Salk. 15; Gilb. 185.

(*z*) *Sandback* v. *Thomas*, 1 Starkie's C. 306. But see *Sinclair* v. *Eldred*, 4 Taunt. 7.

(*a*) *Savil* v. *Roberts*, B. N. P. 13.; *Chambers* v. *Robinson*, Stra. 691.

(*b*) Ibid.

(*c*) *Edmonds* v. *Walter*, 3 Starkie's C. 7.

(*d*) *Tripp* v. *Thomas*, 3 B. & C. 427.

to state (*e*) whether another member took part in a particular discussion, but cannot be examined as to what was said in the course of the debate.

In *Curry* v. *Walter* (*f*), a barrister was subpœnaed, to prove that he had made a motion in the court of King's Bench for a criminal information against the plaintiff, for publishing which the latter brought his action. Upon the trial, Eyre, C. J. was of opinion that it was improper to call a barrister as a witness to prove such a circumstance, but that the party ought to prove it by other means; that it was at the option of the counsel to give or withhold his testimony.

(*e*) 5 Esp. R. 136. (*f*) 1 Esp. 456.

CHAPTER II.

Evidence for the Defendant.

IT has already been seen of what means of defence the defendant may avail himself under the plea of the general issue (*a*).

Under that plea it is incumbent on the plaintiff to establish his cause of action as alleged in the declaration; but where he has once established a *primâ facie* case by proof of the speaking or publishing matter which, unexplained, is injurious and actionable, it lies on the defendant to explain it if he can, and to show by reference to circumstances, that the supposed slander or libel was not in fact used in an injurious and actionable sense (*b*), or that it was used under

(*a*) Supra, vol. 1. p. 452.

(*b*) Cro. J. 114. B. N. P. 5. Vide supra, vol. 1, c. 8. & 13. In the case of *Wilson* v. *Stephenson*, 2 Price, 282, the jury found that words charging the plaintiff with being a murderer, and having murdered his brother, had been spoken by the defendant, but had not been spoken maliciously, and a verdict having been entered on this finding for the defendant, the court refused a new trial, being of opinion that it was en-

circumstances which afforded either an absolute or qualified justification (*c*).

In the case of *Penfold* v. *Westcote* (*d*), it was proved that the defendant said of the plaintiff, "Why do not you come out, you blackguard rascal scoundrel? Penfold, you are a thief." The witness who proved the words was not asked whether by the word thief he understood that the defendant meant to charge the plaintiff with felony.

Chambre, J. in his direction to the jury, said that it lay on the defendant to show that felony was not imputed by the word thief. And after a verdict for the plaintiff, a new trial was refused.

The defendant, according to the ordinary rule, is entitled to have the whole of the alleged libel read (*e*), or the whole of the conversation in which the slander complained of was spoken, detailed in evidence. For he is entitled to show by the whole context, that the alleged libel or words

tirely a question for the jury, although evidence had been given of other language of reprobation used at the same time, and in fact the plaintiff had been the innocent cause of his brother's death by the discharge of a small cannon. But see the case of *Bromage* v. *Prosser*, supra, vol. 1, p. 221.

(*c*) Supra, vol i. p. 229.

(*d*) 2 N. R. 335. *Christie* v. *Cowell*, Peake's C. 4. Sel. N. P. 1250.

(*e*) *Cooke* v. *Hughes*, 1 R. & M. 112.

were not in fact used in an actionable sense. And where a letter of the defendant's was read, which referred to an account of the transaction related in a newspaper, that newspaper, it was held, was evidence (*f*).

Where it plainly appears from the context, that the words were not used in a felonious sense, the plaintiff will be nonsuited upon his own showing (*g*).

Where the defendant shows facts in defence as an answer to the action in the absence of express malice, it is still a question for the court whether in point of law the slander does not manifestly exceed the limits of communication which such an occasion would justify: when that is the case, the question of express malice is not to be left to the jury (*h*).

(*f*) *Weaver* v. *Lloyd*, 2 C. & P. 296. Cor. Garrow, B.

(*g*) *Thompson* v. *Bernard*, 1 Camp. C. 48.

(*h*) *Godson* v. *Flower*, 2 B. & B. 7. The defendant wrote a letter, blaming the party addressed for employing the plaintiff (an attorney), adding, "If you will be misled by an attorney who only considers his own interest, you will have to repent it, &c." It was held that the jury were properly directed to consider whether the expressions were meant of the profession in general, or of the plaintiff in particular; and that it was not necessary to leave it to them whether it was a *bonâ fide* or *malicious* publication; and Richardson, J. observed, "If a man giving advice call another a thief, surely it is not necessary to leave it to the jury whether this is a confidential communication. And see *Brown* v. *Croom*, 2 Starkie's C. 297.

The defendant may also show in defence, that the plaintiff himself procured the act to be done of which he complains (*i*).

The plaintiff cannot recover if the vocation in which he is libelled be an illegal one (*k*).

It is perfectly well settled, that the defendant cannot, under the plea of the general issue, in an ordinary action for slander, go into evidence of the truth of the imputation, even for the purpose of mitigating the damages (*l*).

But doubts have arisen upon the question to what extent the defendant is at liberty to impeach

(*i*) *King* v. *Waring*, 5 Esp. C. 13. Where the witness in an action for a libel stated, that having heard that the defendant had a copy of the print (alleged to be libellous), he went to his house, and requested to see it, on which the defendant produced it, and pointed out the figure of the plaintiff and the other persons ridiculed, Ld. Ellenborough held, that the publication was insufficient. *Smith* v. *Wood*, 3 Camp. 323.

Tamen quære, for there was no evidence to show that the plaintiff was in privity with the witness.

(*k*) *Hurst* v. *Bell*, 1 Bingh. 1. where the plaintiff complained of having been libelled in his vocation as an exhibitor of sparring matches; nor does an action lie for a libel against a party touching his conduct in any illegal transaction. *Prissari* v. *Clement*, 3 Bingh. 432. *Secus* where the matter is independent of the illegal transaction, though arising out of it.

(*l*) See the resolution of the judges in *Underwood* v. *Parkes*, Str. 1200. *Mullett* v. *Hulton*, 4 Esp. C. 248. Infra, 98.

the plaintiff's character, by affecting him with a suspicion of the truth of the alleged calumny (*m*).

The main question seems to have been, whether the defendant be at liberty to do more than to impeach the plaintiff's character by general evidence, or whether he be also entitled to go into evidence of particular facts, tending to show that the plaintiff had been guilty of the particular act imputed to him.

General evidence to show that the plaintiff, previously to the alleged slander, laboured under a general suspicion of having been guilty of similar practices, seems in principle to be admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted with suspicion, or that he had in fact little character or reputation to lose? To deny this, would be to decide that a man of the worst of characters was entitled to the same measure of damages with one of unsullied and unblemished reputation; a reputed thief would be placed on the same footing with the most honourable merchant

(*m*) See *Mullett* v. *Hulton*, 4 Esp. C. 248. *The Earl of Leicester* v. *Walter*, 2 Camp. C. 251. 1 M. & S. 284. and infra, 89, 90, &c.

—a virtuous woman, with the most abandoned prostitute.

To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential (*n*).

(*n*) Lord Ellenborough, C. J. in the case of —— *Moore*, 1 M. and S. 284, laid down both the rule itself, and the principle on which it is founded, in the most clear and explicit manner; he observes, "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence." And Grose and Bayley, Js. agreed, that such evidence was admissible in mitigation of damages.

In the case of the *Earl of Leicester* v. *Walter*, 2 Camp. C. 251, an action was brought for a libel published in the Morning Herald, imputing to the plaintiff the offence for which Lord Audley suffered in the reign of Ch. I. The declaration contained the usual exculpatory averments, and stated that the plaintiff had lost the society of many worthy subjects in consequence of the publication. The defendant pleaded not guilty.

Upon the trial before Sir J. Mansfield, C. J. evidence was offered in mitigation of damages, that at the time of the publication the plaintiff was generally suspected to have been guilty of the charge imputed, and that in consequence of this general suspicion his acquaintance had deserted him.

This evidence was objected to. It was contended that it would be in vain to bring an action if such evidence were permitted; that a plaintiff could not come prepared to defend every act of his life. That there was nothing on the record to put the character in issue; and that to admit such evidence

The question whether the defendant should be permitted to adduce evidence of particular facts,

would only be giving the defendant an opportunity of continuing and aggravating the original libel.

Sir J. Mansfield, C. J. admitted the evidence, observing, that he could never answer to his own satisfaction, the arguments used for the plaintiff. That since it had been held that any *thing short of proving the charge imputed in the libel was evidence in mitigation, he did not know how to reject the witnesses.* Besides that, the declaration stated that the plaintiff had always preserved a good character in society, from which he had been driven by the insinuations in the libel. That the question for the jury was, whether the plaintiff had actually suffered this grievance or not, and therefore that evidence to show that his character was in as bad a situation before, as after the libel, must be admitted.

The learned judge, in summing up, directed the jury to consider, in assessing the damages, whether the reports which had been proved were sufficient to show that the plaintiff could receive little injury; and that, in this point of view, it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

In the case of *Williams* v. *Callender*, Holt's C. 307. Lord Ellenborough is reported to have said, that "though there was no justification on the record, the defendant might give in evidence somewhat of the real character of the plaintiff, and show that it was not unblemished and entire. And see Holt's Law of Libel, 270.

In the case of *Ellershaw* v. *Robinson* and *Ux*, Sum. Sp. Ass. 1824, which was an action for words imputing to the plaintiff, a widow, an adulterous intercourse with Robinson, in consequence of which special damage had been sustained. Holroyd, J. held, that it would be competent to the defendants

tending to shew that the plaintiff was really guilty of the charge imputed to him, stands on a

to go into general evidence to impeach the plaintiff's character for chastity. See also *Eamer* v. *Merle*, cited in the case of the *Earl of Leicester* v. *Walter*, 2 Camp. 251.

In the case of *Jones* v. *Stevens*, 11 Price, 235, which was an action for a libel on the plaintiff in his character of attorney, and containing general reflections on the plaintiff's professional conduct and respectability,—the defendant pleaded the general issue, and several pleas of justification, some of which alleged, in very general terms, that the plaintiff had conducted himself in an unprofessional and disreputable manner. On the trial, the defendant proposed to prove by witnesses in support of the pleas of justification, and in contradiction of the general averment in the declaration that the plaintiff had carried on the profession and business of an attorney with great credit and reputation, that the plaintiff was of general bad character and repute in his business of an attorney; but the evidence was rejected by the Chief Baron as inadmissible: and on motion, afterwards, for a new trial, the court of Exchequer was of the same opinion, and held with many forcible observations, that such evidence was not admissible, either in mitigation of damages, or in support of any of the allegations contained in the pleas of justification. Wood, B. observed, "I have ever understood that general good character is always presumed in law, unless by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned wherein it should seem that such evidence has been received at Nisi Prius: I will not attempt to distinguish the present from those —I strongly protest against any such mischievous doctrine altogether, and deny that it has any legal foundation.

In the above case, that of *Waithman* v. *Weaver* was cited,

very different foundation. To allow this, generally, would be to overturn the rule laid down,

to show the opinion of Abbott, L. C. J., that in an action for a libel on a tradesman, insinuating that he had been guilty of receiving stolen goods, evidence was inadmissible to show that the libel was no more than a repetition of rumours which were prevalent at the time, of the facts imputed to the plaintiff; and according to the report of the case in 11 Price, 257, n, his lordship was not satisfied that he ought to receive the evidence, which was afterwards withdrawn. But according to the report of the same case, 1 D. & R. 10. the defendant's counsel offered in evidence *facts* short of a complete justification; and all that his lordship decided was, that *facts* were not admissible in evidence: and his lordship distinguished the case from that of the *Earl of Leicester* v. *Walter*, on the very distinction between evidence of *rumours* and evidence of *facts*. He observed, "The case of the *Earl of Leicester* v. *Walter* is very different from the present. There, evidence of rumours was admitted, to show that the plaintiff, having previously lost his character, had sustained no injury; here it is proposed to give not rumours, but facts, in evidence, and there is a vast distinction between rumours and facts. I think the rule isnot so laid down in any of the cases which have been decided on this subject, as to preclude the exercise of my own judgment; and I am decidedly against the reception of the evidence proposed to be adduced. I own that I have always thought the rule to be, that under the general issue *facts* cannot be given in evidence, unless they are pleaded as matter of justification, and I have not been satisfied with any of the cases which have laid down a different position." Notwithstanding the respect which all must entertain who have had opportunities of judging of the profound learning and clear apprehension of the venerable judge (Wood, B.) who, in the case of *Jones* v. *Stevens*,

in the case of *Underwood* v. *Parkes*, by all the judges—that the truth of the imputation, should

expressed so strong and decisive an opinion on the inadmissibility of *general* evidence of previous bad character, in actions for slander, it may be permitted to remark, that though the law presumes in favour of character, it is but a presumption capable of proof to the contrary, and that in several instances the law does not permit character to be impeached by evidence of particular facts, but by general evidence only; as where the general credibility of a witness is impeached, or the character of a prosecutrix on a charge of rape. The principle on which such general evidence is admitted, whilst evidence of particular facts is excluded, has been frequently recognised: it is this,—that the party may be prepared with general evidence in support of character, though he cannot be supposed to be prepared with evidence to justify his conduct through life.

In *Snowdon* v. *Smith*, Devon. Lent Assizes, 1811, 1 M. & S. 286, note (a), in an action against the defendant for saying "that he had heard that the plaintiff had been guilty of unnatural practices," to which the defendant pleaded a justification alleging instances, Chambre, J. would not permit a witness to be asked whether such reports as the defendant had stated had not gone abroad, and held, that the case of the *Earl of Leicester* v. *Walter* did not apply, because the defendant had justified. Whether the evidence in this case was rightly rejected, or not, on the ground alleged in the report, it is clear that the learned judge did not mean to rule in opposition to the *Earl of Leicester* v. *Walter*. It might, perhaps, be difficult to sustain the distinction on the ground of a justification pleaded. The reason for admitting such evidence is to show, that in fact the plaintiff had sustained little injury as to character, and so to reduce the damages; and that is a

not be given in evidence under the general issue, even in mitigation of damages; for if, as seems

reason for admitting such evidence, which is wholly independent of the question of justification; and for that purpose such evidence may be admissible, though wholly inadmissible as evidence to prove the justification. It is, however, to be observed, that there may be a distinction between evidence of *particular rumours*, such as was rejected in the case of *Snowdon* v. *Smith*, and *general evidence*, to show that the plaintiff's character had been previously tainted and reduced. The plaintiff complains of loss of character; the question is, what character had he to lose? If he had but little, he can have lost but little: and, strictly speaking, the evidence of mere rumours is not directly applicable for this purpose,—such rumours may have partially prevailed, but not have obtained credit. The proper question seems to be, what was the plaintiff's general character for honesty or humanity, according to the nature of the slander, previous to the alleged injury.

It may be observed, that the rule which excludes evidence of particular facts, which prove or tend to prove the truth of the alleged slander, is attended in practice with this inconvenience, that a defendant, for the sake of being admitted to give evidence of facts, which he might reasonably expect would, if disclosed, greatly reduce the damages, is under the necessity of pleading a justification which he knows that he cannot support. If A. published that B. had committed a robbery, and the fact was that B. had attempted a robbery, which, in legal strictness, was not consummated, A. in an action for the slander, must either plead a justification which he knows that he cannot prove, or he would be excluded from that evidence which ought to be followed by mere nominal damages. In practice no great inconvenience is occasioned; in this, as in many other instances, a skilful pleader will resort to pleas of

to have been held by Eyre, C. J. (*m*), the defendant might in mitigation of damages give any evidence short of such as would be a complete defence to the action; how would it be possible to draw the line, and to restrain the evidence of facts tending to throw suspicion on the plaintiff within such limits, that it should not produce actual conviction on the minds of the jury? The practice, it is obvious, would be attended with all the hardship and inconvenience which would result from admitting a complete justification under the general issue; for the plaintiff would be equally liable to surprise, and as little able to meet the charge in the one case as the other.

No such objection applies to general evidence affecting the plaintiff's character, for every one who possesses a good character in society may come prepared with general evidence to support it, but no one can be ready to answer parti-

little or no use as to the issues founded upon them, but of the greatest importance with a view to the admission of evidence. The incongruity of rejecting evidence as to the quantum of damages, which ought materially to govern the amount, without pleading a false plea, might be avoided, as well as the inconvenience which would result from permitting such evidence to be given without notice, by admitting it conditionally, after due notice given to the plaintiff of the defendant's intention, to prove the specific facts in mitigation of damages.

(*m*) *Knobell* v. *Fuller*. Infra. 96.

cular charges unless he be previously apprized of them (*o*).

In the case of *Knobell* v. *Fuller* (*p*), evidence

(*o*) See the observations of Bayley, J. in *R.* v. *Watson*, 2 Starkie's C. 152.

(*p*) An action was brought for a libel published in the Morning Post, charging the plaintiff with having been concerned with a person of the name of Knowles in procuring money from the relatives and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of Portland, in whose service the plaintiff was.

The defendant pleaded the general issue, and in mitigation of damages offered evidence to prove strong grounds of suspicion against the plaintiff. Eyre, C. J. at first doubted whether this evidence was admissible.

Adair, Serj. for the defendant, admitted that the defendant could not give in evidence on the general issue facts which, if pleaded, would amount to a justification; but contended that they might prove facts which showed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature. A note of the case of *Curry* v. *Walter* was then read, in which his Lordship admitted the distinction, and received such evidence.

Eyre, C. J. said, he believed, in that case, he admitted the evidence in order to show that the defendant had not in fact published a libel, he having only published the proceedings of a court of justice, which the court afterwards determined to be no libel in point of law; but he would not deny but he might also have received it in mitigation of damages: for though he had never known the evidence given in an action for a libel, yet he had always understood, that in an action

was admitted at Nisi Prius, of specific facts, upon the general doctrine, that *any* evidence was admissible in mitigation which fell short of a complete justification; and in the case of the *Earl of Leicester* v. *Walter* (*q*), Sir J. Mansfield, C. J. seems to have acceded to the general position, but in that case the evidence which was admitted was of a general nature and not of specific facts.

There seems to be no well-founded distinction as to the admission of *general evidence* of character, whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue; for the object of such evidence is to diminish the damages, which he is entitled to do, though he fail to establish his justification (*r*).

The defendant is not allowed to prove, under the general issue, even in mitigation of damages, that

words the defendant might, in mitigation of damages, give *any evidence short of such as would be a complete defence to the action*, had a justification been pleaded.

The defendant then called Mr. Ford, a magistrate, to prove, that on the examination of the plaintiff before him, he *admitted* that he had received five guineas for conveying a letter to the duke; and the duke himself being examined, said, that thinking the plaintiff had misconducted himself in that respect, he had discharged him from his service.

(*q*) 2 Camp. 251. Supra. 89.

(*r*) *Lord Leicester* v. *Walter*, 2 Camp. 251. 1 M. & S. 284. *Rodriguez* v. *Tadmire*, 2 Esp. C. 720. Vide supra. 89.

the specific fact in which the slander consists, and in respect of which the action is brought, was communicated to him by a third person (*s*).

But where the defendant has in the libel referred to the source from which he derived his information, he may, it seems, although he has not justified, prove, under the general issue, that he did in fact receive such information (*t*). As where the libel refers to a newspaper as the medium of communication (*u*).

In a late case the defendant was allowed to inquire of a witness whether he had not read the substance of the alleged libel in a public newspaper (*x*).

In *Mullett* v. *Hulton* (*y*), the declaration stated that the plaintiff was about to take a house, but that the defendant, in order to prevent him, addressed a letter to the owner, containing the following passage: "Mr. Hulton cannot for a moment suppose that Mr. Salter is acquainted with the newspaper particulars relative to the party alluded to (the plaintiff); otherwise it is not probable that Mr. Salter would introduce an ac-

(*s*) *Mills* v. *Spencer*, Holt's C. 513.
(*t*) Ib. see *R.* v. *Burdett*, 4 B. & A. 717.
(*u*) *Mullett* v. *Hulton*, 4 Esp. C. 248.
(*x*) *Wyatt* v. *Gore*, 1 Holt's C. 303.
(*y*) 4 Esp. 248.

knowledged felon, debauchee, and seducer, into the neighbourhood of Angel Row."

Erskine, for the defendant, contended that he was at liberty to go into evidence that the plaintiff had been, in fact, a seducer, not as an answer to the action, but in mitigation of damages. He admitted, that not having pleaded the truth of the words, he could not prevent a verdict from passing against the defendant; but that, having referred to newspaper authority for the words used in the letter, and not having given them as his own or from his own knowledge, the defendant should be at liberty to give the fact in evidence as coming from another source, to which he referred in his letter; and as the slander did not proceed from him, it would go in mitigation of damages.

Lord Ellenborough, C. J. said, that as the pleadings stood on the record, the evidence offered was inadmissible as an answer to the action. The libel itself was proved, and there was no justification that entitled the defendant to a verdict; but he added, that as the words referred to a newspaper, and were so written as a quotation from a newspaper, if the newspaper could be produced, he would admit it as evidence, as having caused the defendant to adopt what he had written in the letter, he having so referred to it.

It is no defence to shew that the plaintiff has been in the habit of libelling the defendant, but it is evidence, it has been said, in mitigation of damages (*z*). The latter, however, of these positions is too large, and it seems that, at most, the defendant cannot be allowed to do more than prove the publication of libels by the plaintiff, which are connected with the libel, which is the subject of the action (*a*). As where such previous libels constitute the provocation to the principal libel (*b*).

As the defendant, when he insists upon the truth of the imputation, must plead it specially, the proof must of course depend in a great measure upon the allegations upon the record; there seems to be little if any difference between the evidence in proof of a specific charge, thus involved in a civil proceeding, and the evidence which is essential to support an indictment con-

(*z*) *Finnerty* v. *Tipper*, 2 Camp. 76. See *Pasquin's* case, ib. and *Tabart* v. *Tipper*, 1 Camp. 380.

(*a*) *May* v. *Brown*, 3 B. & C. 113. general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible. *Finnerty* v. *Tipper*, 2 Camp. 76. *Wakely* v. *Johnson*, 1 R. & M. 422.

(*b*) Ib. It was doubted in that case, by Abbott, L. C. J., whether general evidence would be admissible to prove the fact; it seems, however, to be clear in principle, that the libels themselves ought to be strictly proved.

taining a similar charge (*c*). It may indeed happen, that more precise evidence may be necessary to support such a justification than would be sufficient to sustain an indictment, for the proof, in the former case, is governed by the allegations in the plea, and allegations in a plea may frequently require precise proof, though they would not have done so in an indictment. For instance, if the slander consist in charging the plaintiff with having stolen *sovereigns* in the plural, the plea must necessarily charge him in the plural also, and the defendant would fail in his justification if he could prove no more than the stealing of one; but on the trial of an indictment for larceny, the variance would be wholly immaterial.

It has been seen that, though the slander be general, the plea of justification must be particular (*d*). But should the plaintiff, instead of demurring to a plea for generality, take issue upon it, the defendant will still be bound to prove the slander or libel as stated in the declaration with all its circumstances of exaggeration (*e*); even although the plea merely state that the matters alleged in the supposed libel are true in substance and effect (*f*); where a libel charged the plaintiff

(*c*) *Cooke* v. *Field*, 3 Esp. C. 233.
(*d*) Supra. vol. i. 477.
(*e*) *Weaver* v. *Lloyd*, 2 B. & C. 678.
(*f*) Ib.

with having knocked out the eye of a horse and other acts of cruelty, and the defendant pleaded that the matters contained in the alleged libel were true in substance and in fact, the jury having found that it was true in all particulars, except that the eye was not knocked out, the court held that the plaintiff was entitled to a verdict on that plea (*g*). But it would not be necessary in such case to prove circumstances which were not ingredients in the slanderous charge (*h*).

Where words, not contained in the declaration, are given in evidence in order to prove malice, the defendant may, under the general issue, prove the truth of those words (*i*).

The acquittal of the plaintiff, on an indictment charging him with the same offence as is specified in the plea, does not preclude the defendant from proving the truth of the charge (*k*), nor, indeed, does it seem to be evidence at all.

Evidence of general good character is admissible to rebut the presumption of guilt (*l*). And the plaintiff may adduce general evidence of good

(*g*) *Weaver* v. *Lloyd*, 2 B. & C. 678.

(*h*) *Edwards* v. *Bell*, 1 Bingh. 403. Supra, v. 1, p. 483.

(*i*) *Warne* v. *Chadwell*, 2 Starkie's C. 457. *Collison* v. *Loder*, B. N. P. 10.

(*k*) *England* v. *Bourke*, 3 Esp. C. 80.

(*l*) See Starkie's Law of Evidence, part iii. 365.

character, before any evidence to the contrary has been adduced on the other side (*m*).

Where the defendant justifies, alleging that he heard the words from another whose name he mentioned when he repeated them, the proof depends on the issue taken. Upon issue taken on the general replication de injuriâ, &c., it lies on the defendant to prove, that he heard the very words spoken by such third person, as alleged in the plea, and that on repeating them he gave up his author; for the object of the plea is to shew, that the defendant has afforded to the plaintiff a certain cause of action against another. It would not be sufficient under this issue to prove, that the third person spoke words to the same *effect* with those alleged (*n*).

In actions for malicious prosecutions and other special actions on the case, where the plaintiff is bound to prove express malice and the want of probable cause, the defendant is at liberty to prove that the fact was true, or give any other evidence to show probable cause under the general issue, without a special justification. For this is merely to repel the proof which is necessary

(*m*) *King* v. *Waring*, 5 Esp. C. 13. But there the action was brought by a servant for giving a false character.

(*n*) See *Lord Northampton's* case, 12 Rep. 202. *Crawford* v. *Middleton*, 1 Lev. 82. *Maitland* v. *Golding*, 2 East, 425. *Woolnoth* v. *Meadows*, 5 East, 463.

to sustain the plaintiff's case: thus, in an action for slander of title, where the slander consists in alleging that the plaintiff had encroached on his landlord's land, it was held, that the defendant was at liberty to prove that encroachments had in fact been made (*o*).

(*o*) *Watson* v. *Reynolds*, 1 M. & M. 1. and see *Hargreave* v. *Le Breton*, 4 Burr. 2422. *Smith* v. *Spooner*, 3 Taunt. 246. *Pitt* v. *Donovan*, 1 M. & S. 639. Supra, vol. i. 320.

CHAPTER III.

Proceedings after Verdict.

WHERE the situation in which the defendant was acting at the time of speaking the words, or publishing the libel, was such as to rebut the implication of malice, and no express malice was proved, the court will, after a verdict for the plaintiff, grant a new trial (*a*); and this, even though the defendant knew that what he said was not strictly true, provided the variation from the truth be immaterial to the interest stated to have been affected (*b*). But where the false assertion of the defendant is material, no new trial will be granted, though the defendant had an interest in the subject matter affected (*c*).

Where the damages are so outrageous as to induce a strong presumption of partiality in the jury, a new trial will be granted in an action for slander, as well as in other cases, though in such an action

(*a*) See the observations of the Court in *Bromage* v. *Prosser*, 4 B. & C. 247.

(*b*) 4 Burr. 2422.

(*c*) See *Smith* v. *Spooner*, vol. i. p. 236.

the amount of the loss sustained from the injurious act depends upon circumstances of all others the most appropriate for the calculation and assessment of a jury.

In the case of *Lord Townsend* v. *Dr. Hughes* (*d*), which was an action for scandalum magnatum, the words were, "He is an unworthy man, and acts against law and reason." The jury found a verdict for the plaintiff with £4000 damages. A new trial was moved for on these grounds:

1. Because the witnesses who proved the words were not persons of credit, and that, at the time when they were alleged to be spoken, many clergymen were in company with the defendant, and heard no such words spoken.

2dly. Because one of the jury confessed that they gave such great damages to the plaintiff, not that he was damnified so much, but that he might have the greater opportunity to show himself noble in the resisting of them.

3dly. (Which was the principal reason,) becauss they were excessive.

North, C. J. and Wyndham and Scroggs, Justices, were of opinion, that no new trial ought to be granted; that in a civil action, where the words themselves are actionable, without an averment of special damage, the jury ought to take into

(*d*) 2 Mod. 150.

consideration the whole of the damage which the party might sustain, since he could not bring a fresh action; that it was impossible for the court to tell what value to set upon the honour of the plaintiff; that the jury were, by law, judges of the damages; and that it would be very inconvenient to examine upon what account they gave their verdict.

Atkins, J. dissented from his brethen, conceiving that the court ought to compare the words with the damages, and to consider whether they bore any proportion. He also cited the case of *Gunston* v. *Wood*, where the plaintiff, in an action on the case for calling him a bankrupt, recovered £1500 damages; and the court granted a new trial, because the damages were excessive.

In the same case it was said by Scroggs, J. that had the jury given but one penny damages, the plaintiff could not have obtained a new trial in hopes to increase them.

When the plaintiff's title to recover does not appear perfect upon the face of the record, the defendant may take his objection, either by moving in arrest of judgment within the usual time, or by bringing a writ of error.

It has already been seen what are the rules to be observed in the construction of the defendant's expressions; that they are to be taken according to their plain and obvious meaning, and in the

sense in which the hearers or readers understood them.

After a verdict for the plaintiff, by which the defendant's act, meaning, and intention, have been ascertained to correspond with the statement upon the record, the courts will not listen to trivial exceptions, but require the party objecting to point out (*e*) a substantial objection upon the face of the proceedings.

And, in general, where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict (*f*).

Where there are several counts in the declaration, and entire damages are given, if one count be defective, judgment must be arrested for the whole, since it is impossible for the court to apportion the damages, and to say what abatement ought to be made in respect of the vicious count (*g*).

And the same rule holds in case one count in the declaration contain words averred to have been spoken at different times, some of which are not actionable. As, if at one time the defendant call

(*e*) See the opinions of Lord Ellenborough, C. J.; Le Blanc, J; Lord Mansfield, C. J.; Parker, C. J.; Lord Holt, C. J.; Pratt, J.; Buller, J.; and De Grey, C. J. as cited above, vol. i. p. 64, &c.

(*f*) 8 Mod. 240.

(*g*) *Holt* v. *Scholefield*, 6 T. R. 694.

the plaintiff "traitor," and at another time "arrant knave and cozener;" and the plaintiff allege (*h*) the words to have been spoken at different times, as several causes of action, if the jury assess the damages generally, judgment will be arrested.

But if actionable words be averred to have been spoken at the same time with others not actionable, the latter are considered (*i*) as laid, merely in aggravation. If the declaration consist of several counts, in one of which the words are not actionable, and no special damage be averred, or, supposing it to be averred, the finding of the jury as to the special damage be for the defendant, and as to the rest generally for the plaintiff, the judgment would be erroneous, and might be avoided by motion, or reversed by writ of error (*k*).

Where, therefore, there is any doubt as to the validity of any one count (*l*), it is a matter of prudence to have the damages assessed severally, or to take a verdict upon the other counts only. In (*m*) *Rick* v. *Holt*, the words laid down as spoken of the plaintiff at one time were, "You

(*h*) Cro. Eliz. 329. Cro. Car. 236, 237, 328. 3 Wils. 185.

(*i*) 3 Wils. 185. *Lloyd* v. *Morris*, Willes Rep. 443. Roll. Ab. 576. Moor, 142, 708. Cro. Eliz. 328, 788. 1 Buls. 37.

(*k*) See the cases, 2 Will. Saund. 171. d.

(*l*) *Burnet* v. *Wells*, 12 Mod. 420.

(*m*) Cro. J. 267.

are a paltry lawyer, *and use to play on both hands;*" at another, "He is a furtherer and maintainer of felonies." The defendant as to all the words, except those in italics, pleaded not guilty, and as to those a justification. The plaintiff replied, *de injuriâ propriâ, &c.* The jury, upon the first issue, found the whole of the words, and assessed damages for the whole; they likewise found the second issue for the plaintiff, assessing separate damages. The court, on motion in arrest of judgment, decided, that the words, "You are a paltry lawyer," were not actionable, but held that the plaintiff was entitled to judgment on the first issue. It should seem, however, that the plaintiff was not entitled to judgment under the first assessment, supposing the decision to have been correct, that the words "You are a paltry lawyer" were not actionable.

For the words to be considered under the first issue of not guilty were the two sets, "You are a paltry lawyer," and "He is a furtherer and maintainer of felonies," the words in italics not coming under the consideration of the jury, since they were confessed; the damages under the first assessment were, therefore, partly given for the words, "You are a paltry lawyer," which were held not actionable.

It is said to be the practice in the Court of Common Pleas, to award a *venire de novo* where

judgment is arrested in such case, upon payment of costs, in order that the plaintiff may sever his damages (*n*). But in the case of *Holt* v. *Scholefield* (*o*), in the King's Bench, a *venire de novo* was refused.

In the case of *Beevor* v. *Hides* (*p*), Bathurst, Justice, expressed an opinion, that where the words in one count were not actionable, yet that the postea might be amended, and a verdict as to those words entered for the defendant, upon the Judge's certifying that no evidence was given of them at the trial.

But Lord Camden said it would be very dangerous, after a verdict of twelve men recorded by the Court, to refer to the Judge's notes in order to alter it, and he thought there was no precedent of such a case, and that the verdict could not be varied.

The general practice however is, where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count, though not upon others, either to amend the postea, which is done where it clearly appears that no evidence was given on the defective

(*n*) 2 Will. Saund. 171. d. Barnes, 478, 480.
(*o*) 6 T. R. 61. Sed vid. *Eddowes* v. *Hopkins*, Doug. 376.
(*p*) 2 Wils. 300.

counts (*q*), or by awarding a *v. f. de novo*, where such evidence has been given, in order that the plaintiff may ascertain to what damages he is intitled for so much of his cause of complaint as will support damages. It does not distinctly appear, upon what principle actions for slander form an exception to the general rule.

(*q*) This is now the ordinary practice, and it is done by the judge who tried the cause upon summons at chambers.

CHAPTER IV.

Of Costs.

BY the 21 Jac. 1. c. 16. it is enacted, that "in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at Westminster, or in any court whatsoever, that hath power to hold plea of the same; if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, or usage, to the contrary notwithstanding."

This statute, it has been held, does not extend to actions of scandalum magnatum, nor to those where the special damage is the gist of the action, as in case of slander of title (*a*), nor to actions for libel (*b*).

(*a*) 2 Bl. 1062. 2 Ld. Raym. 1588. Prac. Reg. 111. Cro. Car. 140. Jon. 196. 2 Ld. Ray. 831. 1 Salk. 206. 7 Mod. 129. Willes, 438. Barnes, 132. 2 H. B. 531. 3 Burr. 1688. Barnes, 132. 1 Str. 645.

But where the words are in themselves actionable, the case is within the statute, though special damage be averred; for the plaintiff is at all events entitled to a verdict for the actionable words, without proving the special damage; and if he were in such case entitled to costs, where the damages were under 40 shillings, the statute might in all cases be evaded by a suggestion of special damage. This construction is, however, not free from inconvenience, since where special damage has actually accrued, the circumstance of the words being in themselves actionable, may operate to the plaintiff's disadvantage, and he may be placed in a worse situation, by that very presumption of law which was intended for his advantage.

And where it clearly appears, as by a special verdict and separate assessment, that the special damage was actually considered by the jury, it seems reasonable that the plaintiff should have full costs, though the damages do not reach the statutable limit (*c*).

Where the words are actionable, and other matter likewise actionable is stated as a distinct injury, and not as a mere consequence of the words, the plaintiff is entitled to full costs; as

(*b*) *Hall* v. *Warner*, T. 24 G. 3. Tidd, 861.
(*c*) 1 Vent. 93. 1 Mod. 31. 2 Keb. 589.

where the declaration, after stating the words imputing felony, averred that the defendant procured the plaintiff to be imprisoned (*d*).

Where there are different counts in the same declaration, some containing words not actionable, and others containing actionable ones, and special damage be laid referring to all the counts, then the plaintiff will, under a general verdict, be entitled to full costs. For some part of the damages assessed must have been given in respect of the consequential damage (*e*).

The statute extends to damages found under a writ of inquiry (*f*).

It has been held that the statute extends to inferior courts, which hold pleas to a less amount than 40 sbillings only (*g*), Bnt by the st. 58 G. 3. c. 30. s. 2. in all actions for slanderous words, in any court which hath not jurisdiction to hold plea to the amount of 40 shillings in such suits, if the jury assess the damages under 30 shillings, the plaintiff shall recover only so much costs as the damages so given or assessed shall amount to, without further increase.

The 22d and 23d C. 2. c. 9. is very general in its terms, which comprehend "all personal ac-

(*d*) Str. 645. Ld. Ray. 1588. Cro. Car. 163. Cro. Car. 307.

(*e*) 2 H. B. 531.

(*f*) 2 Str. 934.

(*g*) Tidd's Prac. 975. 7th ed. 1 Ld. Ray. 181. Hull. on Costs, 38.

tions." By this statute it is enacted, that in such actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of 40 shillings, shall not recover more costs than damages. At first it seems, that the statute was held to extend to all personal actions (*g*); but it appears to be now settled, that it is confined to actions of assault and battery, and for local trespasses, wherein it may be possible for the Judge to certify, that the freehold or title to the land was chiefly in question (*h*).

This statute, therefore, does not affect the present class of actions.

And since the case of slander is not considered to be within the latter statute, a justification does not entitle the plaintiff to full costs, where the damages are below 40 shillings (*i*).

(*g*) 2 Keb. 849. 3 Keb. 121. 247.

(*h*) See Tidd's Prac. (4 Edn.) 861. where the authorities on the subject are collected.

(*i*) *Halford v. Smith*, 4 East, 567. Barnes, 128. 2 Wils. 158.

CHAPTER V.

Of the Writ of Prohibition.

A PROHIBITION to the Ecclesiastical Court is grounded either upon a defect in their jurisdiction, or upon some irregularity in the course of their proceedings.

The power of these courts, in cases of defamation, was expressly recognised by 13 E. 1. st. 4. "In cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when *money is not demanded*, but a thing done for punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Whence it appears that these courts, before the passing of the statute, had the same jurisdiction; and also that the extent of the jurisdiction was to deal out punishments *pro salute animæ* (*a*), and not to award any temporal compensation in the way of damages for loss of character (*b*). And the latter position appears still more clearly

(*a*) 2 Inst. 492. (*b*) Ib.

from the statute of Articuli Cleri (*c*); which enacts, that "In defamations, prelates shall *correct*, the king's prohibition notwithstanding; first enjoining a penance corporal, which, if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be showed."

Under these statutes it has been held, that no suit is maintainable in the Ecclesiastical Courts for any slander (*d*) not of spiritual cognizance. So that an imputation of *perjury* is not a ground for proceeding in the Spiritual Court.

In the instance cited, the party has his remedy by action at Common Law; but provided the slander do not impute any offence cognizable by the Spiritual Court, no punishment can be inflicted for it by such court, though the slander should not be a ground of action at Common Law (*e*). Thus a suit was instituted in the Spiritual Court for calling the plaintiff a false knave, and a prohibition was granted. And it was said (*f*), that though these words do not imply any offence of which the temporal law takes cognizance, yet being also not of spiritual cognizance,

(*c*) 9 Edw. 2. c. 4.

(*d*) 2 Burn. Ecc. L. 120. Ld. Ray. 212. 397. God. 517. 2 Salk. 692. 11 Mod. 112.

(*e*) 2 Ins. 493.

(*f*) Ibid.

the Temporal Courts will grant a prohibition that the Ecclesiastical Courts (*g*) may not exceed their jurisdiction.

And the same rule holds though the words be spoken of an ecclesiastical person. The words spoken of a parson were, "He (*h*) has no sense; he is a dunce or blockhead, and deserves to have his gown stripped over his ears." And it was held that the defendant was not punishable in the Spiritual Court; for a parson is not punishable in that court for being a knave or a blockhead more than any other man; and it was said, that if the parson should be deprived for want of learning, he must bring his action at Common Law.

So it has been held, that to call a dean "a knave" was not sueable in the Spiritual Court.

But where words (*k*) spoken of a parson impute that which, if true, would subject him to censure in the Ecclesiastical Court, he is entitled to sue there.

Where words of spiritual cognizance are coupled with terms of abuse which are not in themselves actionable in the temporal courts, no prohibition will be granted (*l*); so that no prohibi-

(*g*) 2 Ins. 695.
(*h*) *Coxeter* v. *Parsons*, Salk. 692.
(*i*) Holt, R. 593. *Nelson* v. *Hawkins, dean of Chichester.*
(*k*) *Clark* v. *Price*, 11 Mod. 208.
(*l*) 2 Salk. 692.

tion lies in a suit for the words, "He is a cuckoldy knave (*m*);" and the rule is the same though it should be suggested that the words were spoken through heat and passion (*n*).

Where the words themselves are of mere spiritual cognizance, but special damage ensues, for which an action is brought in a temporal court, it seems that no prohibition is grantable.

In the case of *Evans* v. *Brown* (*o*), where the words were of mere spiritual cognizance, a prohibition was moved for upon a suggestion that the plaintiff below had brought an action at law for the words, grounded upon special damage sustained by reason of the defendant's speaking them. It was contended, that this was like the case where one calls a woman whore and thief: in that case she shall not have an action in the Ecclesiastical Court for the words, though she might for the word whore; because it being joined with the word thief, an action lies at Common Law for the words. That in such case the words could not be split, and an action brought at law for the word thief, and a suit in the Ecclesiastical Court for the word whore; so that here, though the words are properly sueable for in the

(*m*) *Gobbett's* case, Cro. Car. 339. Golds. 172.
(*n*) Ld. Ray. 1136.
(*o*) Ld. Ray. 1101.

Ecclesiastical Court, yet a special damage attending the speaking of them, by which means an action lies at Common Law for the words, they shall not proceed for the speaking in the Ecclesiastical Court. But the court refused to grant a prohibition.

But it seems that in general the Spiritual Courts have not, in case of defamation, any concurrent jurisdiction with the courts of Common Law; so that if the same words impute a spiritual and temporal offence, the jurisdiction of the former court ceases. Hollingshead prayed a prohibition to stay a suit in the Spiritual Court for defamation. The words were, "Thou art a bawd, and I will prove thee a bawd;" and because these words were properly determinable in the Spiritual Court, and no action lies for them at Common Law, the prohibition was denied. But (*p*) it was held, that for saying, "Thou keepest a house of bawdry," this being matter determinable at the Common Law by indictment, suit shall not lie in the Spiritual Court.

If a man who has lands by descent sue in the Spiritual Court for words of bastardy, a prohibition lies; for the words tend to the temporal (*q*) disinheritance of the plaintiff.

(*p*) Cro. Car. 229. Str. 1100. Cro. Car. 329.
(*q*) 2 Roll. Ab. 292. Qu. et vid. vol. 1. cap. 4.

But it seems that the mother would, in such case, be entitled to sue in the Spiritual Court, for the imputation upon her own chastity contained in such a charge of bastardy; since, with respect to herself, the slander is of mere spiritual cognizance; and even where the mother and son jointly preferred their libel for such words, a prohibition was denied (*r*).

There seems to be a stronger reason why a man should not sue words of bastardy than the one assigned in Rolle, namely, that he is not punishable for being a bastard.

Where the same words imputed incontinency, and an infection with the venereal disease to the plaintiff, who sued in the Spiritual Court, a prohibition was granted (*s*): although the first words were of ecclesiastical cognizance.

So where words of (*t*) incontinency were imputed at the same time with others of felony, a prohibition was moved for and granted for the whole.

If part of the words be actionable, it seems that a prohibition will be granted for the whole, though the others charge a spiritual offence. As where the defendant said, "You are a whore and thief (*u*)."

(*r*) Ld. Ray. 1287. 11 Mod. 117.
(*s*) Ld. Ray. 446.
(*t*) *Legate* v. *Wright*, H. 10. G. 2.
(*u*) 2 Rol. 297. 1 Sid. 404. 3 Mod. 74.

Where words are of temporal cognizance from the custom of a particular place, a prohibition will be granted. As where words of incontinence are imputed to a woman in London, no suit is maintainable in the Spiritual Court (*x*). If it appear, however, upon suggestion supported by affidavit, or upon the face of the libel itself, that the parties did not live within the scope of the local jurisdiction, no prohibition will be allowed.

Thus, in the case of *W. Johnson* v. *Bewick* (*y*), the words were, "Thou art a whore," and the custom of London was suggested; but it appeared on the face of the suggestion that neither of the parties lived within the jurisdiction of London. It was urged, that it would be hard to deprive the defendant of the power of punishing the plaintiff, for having spoken these malicious and defamatory words in a court where she may proceed, to drive her to another court where she cannot proceed, the plaintiff living out of the jurisdiction of the court. And of that opinion was the whole court; and Holt, C. J. said, that if in such case a prohibition were granted, it would give license to all the market-women, when they were in London, to defame their neighbours, without fear of punishment.

(*x*) Ld. Ray. 711. Str. 187.
(*y*) Ld. Ray. 711.

Where a prohibition is prayed, grounded upon a supposed want of jurisdiction in the Spiritual Court, the defect, if it be not apparent upon the face of the proceedings, must be verified by affidavit (*z*).

In the case of *Argyle* v. *Hunt* (*a*), a prohibition was moved for on the ground of a defect of jurisdiction appearing on the face of the libel, where it was stated, that the words, which were of incontinency, had been spoken in London. But the court said that they could not judicially take notice of the custom, without an affidavit. But in the case of *Power* v. *Shaw* (*b*), a rule to show cause was granted why prohibition should not go for calling a woman strumpet, in Bristol, though there was no affidavit of the custom.

It seems, generally, that any (*c*) words from which the intention to impute whoredom can be collected, will be a good ground for prohibition.

The Spiritual Court is bound to allow the defendant the advantage of any justification which would have availed him at Common Law (*d*).

The plaintiff proceeded in the Spiritual Court

(*z*) M. 12. G. 2. *Hinds* v. *Thompson*. *Driver* v. *Driver*, Hill. 12. G. 2. And. 304.

(*a*) Str. 187.

(*b*) 1 Wils. 62.

(*c*) Str. 471.

(*d*) Com. dig. tit. Prohibition, G. 14.

for the words, "You had a bastard (*e*)." The defendant pleaded that the plaintiff had been sentenced for this cause of having a bastard, and ordered to keep the bastard, at the sessions, at Norwich. Notwithstanding this, the court proceeded, and the defendant, in the Spiritual Court, moved for a prohibition, suggesting the special matter, to which the other party demurred. It was adjudged that the prohibition should stand: for, being sentenced to be the reputed father by the Justices of the Peace, which is by the authority of the Statute Law, that sentence could not be impeached in the Spiritual Court, or elsewhere; and all are concluded to say the contrary until it be reversed.

By the 1st Edw. 3. st. 2. c. 11. "No suit shall be made in the Spiritual Court against indictors. The Commons do grievously complain, that when divers persons, as well clerks as lay people, have been indicted before sheriffs in their turns, and after the inquest procured be delivered before the Justices, after their deliverance they do sue in the Spiritual Court against such indictors, surmising against them that they have defamed them, to the great damage of the indictors, wherefore many people of the shire be in fear to indict such offenders; the king will, that in such

(*e*) Cro. J. 625. 2 Rol. Rep. 82.

case every man that feeleth himself aggrieved thereby, shall have a prohibition framed in the Chancery upon his case."

Though the statute in terms comprehends indictments before sheriffs in their turns only, it seems that it extends to indictments in all other courts, and to all witnesses and others who have affairs in temporal courts (*f*).

By the st. 27 G. 3. c. 44. no suit for defamatory words shall be brought in any of the Ecclesiastical Courts, unless the same shall be commenced within six calendar months from the time when such words shall have been uttered.

The distinction as to the time of moving in prohibition is, that where the defect alleged is extrinsic of the libel itself, the party must apply before sentence in the Spiritual Court; for where the Spiritual Court has an original jurisdiction which is to be taken away upon account of some matter arising in the suit there, after sentence the party shall never have a prohibition, because he himself hath acquiesced in their manner of trial, which is a waiver of the benefit of a Common Law trial. But if the defect of jurisdiction appear upon the libel, the party never comes too late (*g*).

(*f*) 12 Co. 43.

(*g*) *Argyle* v. *Hunt*, Str. 187.

In the early part of the reign of Queen Anne, a prohibition was moved for to stay a proceeding in the court of the Earl Marshal against the defendant, for having said to the plaintiff, who was a knight, "You a knight (*h*)! you are a pitiful fellow, and an inconsiderable fellow," to the great scandal of gentlemen and of the order of knighthood. From the judgment given by Lord Holt upon this occasion, it appears that a prohibition had been sent to a Court of Honour some years before, (though it had then been contended that under the st. 13 Rich. 2. c. 2. the proper mode of resisting any encroachment by such courts, was by a writ from the Privy Council to restrain them;) since in all cases of encroachments by courts of inferior jurisdiction, the proper remedy is by writ of prohibition.

With respect to the court itself to which the prohibition prayed for was to be sent, it appeared that it had been held before the Constable and Marshal till the 15th year of H. 8. when the Constable (*i*) was attainted of treason, and the office extinguished; but that the pleas relating to matters of law had since been held before the Earl Marshal only. But the court were of opinion, that whatever colour there might be to

(*h*) *Chambers* v. *Jennings*, 7 Mod. 125.

(*i*) Stafford, duke of Buckingham.

hold plea of some things before the Marshal alone, there was no pretence to hold plea (*k*) of words.

(*k*) Several instances of great oppression, where this court held plea of words, are cited in Hume and Ld. Clarendon.

CHAPTER VI.

HAVING thus considered the nature and extent of the civil remedy, in respect of malicious and injurious communications, the subject is next to be regarded in reference to the interests of the public.

It may be asserted generally, that the wilful and unauthorized publication of that which immediately tends to produce mischief and inconvenience to society, is a public offence.

The present branch of the subject may be considered—

1st. In reference to the essentials which constitute the offence.

2ndly. The mode of prosecution and punishment.

First, in reference to the essentials which constitute the offence:

These regard—

1st. The nature, quality, and tendency of the matter published.

2dly. The act of the party concerned in the publication.

3dly. His motive and intention.

4thly. Collateral circumstances.

First, as to the nature, quality, and tendency of the matter published.

The offence may consist in the tendency of the communication to weaken or dissolve religious or moral restraints, or to alienate mens' minds from the established constitution of the state, or to engender hatred and contempt of the king or his government, or the houses of Parliament, or the administration of public justice, or in general to produce some particular inconvenience or mischief, or to excite individuals to the commission of breaches of the public peace, or other illegal acts.

Blasphemies against God and religion may be regarded spiritually, as acts of imbecile and impious hostility against the Almighty, or temporally, as they affect the peace and good order of civil society. It is in the latter relation only that such offences are properly cognizable by municipal laws. To attempt to redress or avenge insults to a supreme and omnipotent Creator, would be absurd; but when it is considered that such impieties not only tend to weaken and undermine the very foundation on which all human laws must rest, and to dissolve those moral and religious obligations, without the aid of which mere positive laws and penal restraints would be inefficacious, but also immediately tend to acts of outrage and vio-

lence (*a*), being, for the most part, gross insults to those who believe in the doctrines which are

(*a*) The following are the remarks of the learned Michaelis, on the question whether blasphemy ought to be punished in the temporal courts.—*Michaelis, on the Mosaic Law;* vol. 4. p. 491; Smith's Translation.

With regard, then, to blasphemy, is it irrational, barbarous, and superstitious, that any punishment, should be inflicted on the crimes which are usually comprehended under this name? Almost all nations have accounted it just, and some have punished such crimes with extreme severity. At present, however, the objection that *blasphemy injures not God, he being infinitely exalted above it,* is trumpeted abroad with loud approbation. It does not, indeed, appear very striking to me; and those who make it would seem to have conceived, that the intention of punishing blasphemy were to procure safety to God: that, however, could scarcely have been the unanimous idea of so many nations, and these, too, differing so widely in civilization, climate, and religion; for most of them would probably have conceived, that if God wished to avenge this crime, he would take vengeance at his pleasure, and would not want the aid of human laws for this purpose.

On God's account, then, punishments for blasphemies are *not* necessary; but perhaps they *are* necessary for the sake of our neighbour, who, if he believes in a God, or holds his religion, whether true or false, to be true, always feels himself extremely scandalized by them. Nor is it only blasphemy against the *true* God that ought to be punished, but even that against false gods, supposed saints, and fictitious religion, whenever they happen to be the gods, saints, and religion of the people.

Putting blasphemy entirely out of the question, has any man a right to call me to my face, on account of my opinions,

held up to scorn and contempt, they necessarily become an important subject of municipal coercion and restraint (*b*).

whether true or false, or, which is the same thing, on account of the philosophy which I adopt, a fool, a profligate, a villain! He may be of a different opinion, and may, if I choose to hear him, give his reasons with great animation, in which case, should a harsh word escape him in the keenness of argument, I am bound to overlook it, because I might myself be guilty of the same fault; but if, without having this apology, he should tell me to my face, *The philosophy which you adopt is nonsense; it is abominable—it is imposture; and its author is a villain and a rogue*—I certainly should not be censurable for repaying such insolence with manual chastisement, if the magistrate would listen to no complaint on account of it. And if the man had treated me with such gross rudeness in the presence of others—of my children, perhaps, or my servants, before whom I should thereby have appeared in a contemptible light, his offence would be so much the greater; I ought to have it in my power to complain of it; and though, instead of doing so, I were to give him a drubbing, I certainly should have the excuse of what is called a *justus dolor*, to plead. Again, the offence would be further aggravated, and my right to revenge it the better if he had addressed me in such insolent language in a place where he had no title to be without my permission—for example, in my own house.

Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who of course wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let

(*b*) See note (*b*), *post*, 135.

The importance of such restraints is strongly illustrated in he instance of judicial oaths. The foundation of these is a belief in a superintend-

alone, because every man has a right even to err, without our forcibly interfering to rid him of his errors), but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Were the religion in question only *tolerated*, still the state is bound to protect every person who believes it, from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be only tolerated by the state, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we conceive the people so tame as to put up with any affront, and of course likely to play but a very despicable part on the stage of the world, the state has only to choose between the two alternatives, of either punishing the blasphemer himself or else leaving him to the fury of the people. The former is the milder plan and therefore to be preferred, because the people are apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent.

Nor is this by any means a right which I only claim for the religion which I hold to be the true one, I am also bound to admit it when I happen to be among a people from whose religion I dissent; were I in a Catholic country to deride their saints or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat where decency would have suggested the taking it off; or were I in Turkey to blaspheme Mahomet, or in a Heathen city its Gods;—nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is tumultu-

ing Deity, who watches over the affairs of men, and who will, in a future state, administer rewards and punishments with reference to their

ously, passionately, and immoderately; or else the state would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favour both to me and other dissenters from the established religion, because it secures us from still greater evils. Of the mischief that the blasphemer, and still more the scoffer at religion, does in society, if he succeed in making religion really contemptible, I do not think it necessary here to say a word.

To the complete disowner of religion, whether he disbelieve in a God altogether, or but only as concerning himself in human affairs as punishing sin and ruling the world, and consequently to the blasphemer of the only true God, the state according to the spirit of laws owes no toleration whatever, because no dependence can be placed on such a person, his oath being a mere nonentity; nor is he to be trusted farther than he is under inspection. Should he be a malicious rascal, punishments would be insufficient to secure us against his attacks, because the man who has no dread of another world can hope to escape punishment by suicide. He is therefore a very dangerous member of society. If again the state does not proceed upon this principle, if it tolerates the Atheist and the Infidel, nay, and protects him too, although no dependence can be placed on his doing anything in return for the defence of the country, because he can give himself a dispensation from all oaths, and putting arms into his hands might be hazardous; still such a man must suspect that he is, as I before expressed it, in a strange house wherein he cannot possibly claim equal rights with others. His oath cannot so

conduct here. To remove therefore so solemn and weighty an obligation, would be to overthrow, or at least to weaken, that confidence in human veracity which is necessary for the purposes of society, without which no question of property could be decided, and no criminal brought to justice (*c*).

much as be valid for a proof in any judicial process. He ought, therefore, to behave as a man in a strange house will naturally do, without insulting by his blasphemies the people who lodge and protect him, and yet get nothing from him in return, or else he cannot think it unjust that he should be punished if he does.

In fact, the doctrine that *blasphemy ought not to be punished*, appears to me to border upon the persecution of religion; for thus, the infidel would have a right to blaspheme and we should be obliged to bear it. Nay, even scoffing and reviling religion is, likewise, a persecution of it, and one that is felt very sensibly by its friends; for if I am obliged to let another person insult me to my face, I must consider it as inflicting a deep wound upon my honour.

(*b*) Offences of this nature, because they tend to subvert all religion and morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment. Haw. P. C. B. 1. c. 5.

(*c*) Utiles esse opiniones has quis negat cum intelligat quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocârit; quamque sancta sit societas civium inter ipsos Diis immortalibus interpositis tam judicibus tam testibus. Cic. de LL.

Upon the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints, the punishment for blasphemous, profane, and immoral (*b*) publications is founded, without any view to the spiritual correction or amendment (*c*) of the offender.

Blasphemy against the Almighty by denying his being or providence, contumelious reflections upon the life and character of Jesus Christ (*d*), and in general scoffing, flippant, and indecorous remarks and comments upon the scriptures, are offences at Common Law; for Christianity (*e*), as has frequently been asserted by high authorities, is part of that law. There are also some offences against Christianity in particular, which will be afterwards noticed, as having been defined by certain statutes. The first instance of a prosecution for words reflecting on religion occurred in the 15th year of James I.

Atwood (*f*) was convicted upon an indictment

(*b*) 11 Mod. 142.

(*c*) 4 Bl. Comm. 59. Fitz. 65. 2 Roll. Ab. 78.

(*d*) Haw. P. C. Book 1. c. 5. 1 Vent. 295. 3 Keb. 607. 4 Comm. 59.

(*e*) 4 Bl. Com. 59. 1 Haw. Pl. Cr. c. 5. 1 Vin. 293. 2 Str. 834. 1 Vent. 293. 11 Mod. 142. 1 Str. 416, 788. Fitzg. 65. 2 Roll. Ab. 187. Cro. J. 24. 421. Infra. 138. 143.

(*f*) Cr. J. 421.

before Justices of the Peace for saying "the religion now professed was a new religion within 50 years; preaching is but prating, and hearing of service more edifying than two hours preaching." It was assigned, for error, that this was an offence not inquirable upon indictment before Justices of the Peace, but only before the High Commissioners; and it was referred to the Attorney-General (*g*) to consider thereof, and he certified that it was not inquirable before them, and of that opinion were the whole court.

In the *King* v. *Taylor* (*h*), the defendant was convicted upon an information for saying that "Jesus Christ was a bastard, a whoremaster; religion was a cheat; and that he neither feared God, the Devil, nor man." Hale, Chief Baron, observed, that such kind of wicked and blasphemous words were not only an offence against God and religion, but a crime against the laws, state, and government, and therefore punishable in this (*i*) court; that to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved; and that Christianity is parcel of the laws of England; and, therefore, to reproach the Christian religion is to speak in subversion of the law.

(*g*) Sir Henry Yelverton.
(*h*) Vent. 293. 3 Keb. Rep. 607.
(*i*) I. e. of K. B.

In the cases of *Clendon* (*k*) and *Hall* (*l*), the defendants were convicted of having published libellous reflections upon the Trinity, and it does not seem to have been doubted in those cases whether the offence was of a temporal nature.

In the case of the *King* v. *Woolston* (*m*), the defendant had been convicted of publishing five libels, wherein the miracles of Jesus Christ were turned into ridicule, and his life and conversation exposed and vilified. It was moved in arrest of judgment, that the offence was not punishable in the Temporal Courts. But the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence of temporal cognizance. The counsel for the defendant further contended, that the intent of the book was merely to shew that the miracles of Jesus were not to be taken in a literal but in an allegorical sense, and therefore that the book could not be considered as aimed at Christianity in general, but merely as attacking one proof of the divine mission. But the court said they were of opinion, that the attacking Christianity in this way was destroying the very

(*k*) E. T. 10 Ann, cited Str. 789.
(*l*) 1 Str. 416.
(*m*) Str. 834. Fitzgibb. 64. Barnard.

foundation of it; and that though there were professions in the book that the design of it was to establish Christianity upon a true bottom, by considering these narratives in scripture as emblematical and prophetical, yet that these professions could not be credited, and that the rule is, *allegatio contra factum non est admittenda.*

But the court, in declaring that they would not suffer it to be debated whether writing against Christianity in general was a temporal offence, desired that it might be noticed that they laid their stress upon the term *general*, and did not intend to include disputes between learned men upon particular controverted points; and Lord Raymond, C. J. in delivering the opinion of the court said, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interfere only (*n*) where the very root of Christianity is struck at; and with him agreed the whole court.

An information (*o*) was filed by the Attorney-General (*p*) against Jacob Ilive for publishing a profane and blasphemous libel, tending to vilify and subvert the Christian religion, and to blas-

(*n*) Fitzgibbon, 66.

(*o*) Hill. Term. 29 G. 2. 1756. Digg. L. L. 83.

(*p*) Charles Pratt, Esq. afterwards Chief Justice of the Common Pleas.

pheme our saviour Jesus Christ, and to cause his divinity to be denied, and to represent him as an impostor, and to scandalize, ridicule, and bring into contempt, his most holy life and doctrine; and also to cause the truth of the Christian religion to be disbelieved and totally rejected by representing the same as spurious and chimerical, and a piece of forgery and priestcraft.

An information (*q*) was exhibited against one Peter Annett, by the Attorney-General, for a certain malignant, profane, and blasphemous libel, intituled "The Free Inquirer," tending to blaspheme Almighty God, and to ridicule, traduce, and discredit his Holy Scriptures, particularly the Pentateuch, and to represent, and to cause it to be believed, that the prophet Moses was an impostor, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions, and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of his Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom.

Being convicted upon this information, the sentence of the Court of King's Bench was, that

(*q*) Mich. 3 Geo. 3. 1763. 2 Burn's Ecclesiastical Law, 781.

he should suffer one month's imprisonment in Newgate, stand twice in the pillory, once at Charing Cross, and once at the Royal Exchange, and then be confined in Bridewell to hard labour for one year, and to find security for his good behaviour for the remainder of his life.

An information (*r*) was exhibited by the Attorney-General (*s*) against John Wilkes, for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his Majesty's subjects; to introduce a total contempt of religion, modesty, and virtue; to *blaspheme* Almighty God; and to *ridicule* our Saviour and the Christian religion.

In the *King* v. *Williams* (*t*), the defendant was convicted of having published a libel, intitled "Paine's Age of Reason," which denied the authority of the Old and New Testament; asserted that reason was the only rule by which the conduct of men ought to be guided, and ridiculed the prophets, Jesus Christ, his disciples, and the scriptures. Upon being brought up to receive sentence, Mr. Justice Ashhurst observed, that such doctrines were an offence, not only against God, but against law and government, from their

(*r*) Hil. 4. G. 3.

(*s*) Sir Fletcher Norton.

(*t*) Before Lord Kenyon, C. J. at the Guildhall, 1797.

direct tendency to dissolve all the bonds and obligations of civil society; and that upon this ground it was, that the Christian religion constituted part of the law of the land (*u*).

Daniel Isaac Eaton was convicted upon an in-

(*u*) He observed, that "although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines, which were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment. This crime was farther aggravated by the motive in which it was conceived: there could be no temptation, no sudden impulse of passion, to which man was so often exposed by the frailty of his nature; it could have proceeded only from a cool and malignant spirit." Mr. Justice Ashhurst then pronounced the judgment of the court, which was, "that the defendant be imprisoned in the house of correction for one year, there to be kept to hard labour, and that, at the expiration thereof, he shall give security to the amount of £1000 for his good behaviour for the rest of his life."

Lord Kenyon said, that the sentence was light, very light indeed, considering the nature of his offence, which was horrible to Christian ears: he had known a case of less enormity, where the defendant was sentenced to three years' imprisonment.

formation filed by the Attorney-General (*x*), of having published an impious libel, representing Jesus Christ as an impostor—the Christian religion as a mere fable—and those who believed in it as infidels to God. Upon being brought (*y*) up to receive the judgment of the court, though his counsel addressed the court for the purpose of mitigating the punishment, no exception was taken to the legality or propriety of the conviction.

It appears, therefore, to have been long ago settled, that blasphemy against the Deity in general, or an attack against the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offence at Common Law. The same doctrine has been fully recognised in several recent cases (*z*).

With respect to the extent of this offence, and the nature and certainty of the words, it appears,

(*x*) Sir Vicary Gibbs, Knt.

(*y*) Easter Term, 52 G. 3.

(*z*) *Rex* v. *Carlile*, 3 B. & A. 161. where the defendant, having been convicted of publishing two blasphemous libels, was, in Mich. T. 60 G. 3., sentenced to pay a fine of £1500, to be imprisoned for three years, and to find sureties for his good behaviour for the term of his life. Also in the case of *R.* v. *Waddington*, 1 B. & C. 26. and *R.* v. *Taylor*, who in Hil. T. 1828, was sentenced to pay a fine, and to suffer one years' imprisonment, for a blasphemous discourse.

in the first place, to be immaterial, whether the publication be oral (*a*) or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment.

Again, it does not, in principle, seem to be material, whether the direct attack is made upon religion in general, or upon some particular proof or evidence in support of it: thus, in Woolston's case, the publication was considered to be illegal, though the immediate and professed object of the writer was to overthrow the evidence of the divine mission supplied by the miracles, and to degrade them into mere emblems and allegory. The court were there of opinion, that a *general and deliberate intention* to subvert Christianity might be *evidenced* by an attempt to weaken one of the several proofs upon which its credibility rests; and, indeed, it would be inconsistent to inflict penalties for any general attack upon the system of Christianity, and yet to allow its foundations to be gradually sapped and undermined with impunity.

It may be asked, is every publication which

(*a*) *The King* v. *Atwood*, Cro. J. 421. *The King* v. *Taylor*, 3 Keb. Rep. 607. Vent. 293. *The King* v. *Taylor*, Hil. T. 1828.

tends to weaken any particular argument which has been adduced to prove the existence of a superintending Deity, or the truth of Christianity, illegal and indictable? There can be no doubt as to the general right of inquiry and discussion even upon the most sacred subjects, provided the license be exercised in the spirit of temperance, moderation, and fairness, without any intention to injure or affront (*b*). In the cases cited, the defendants were charged with having exposed Christianity and its doctrines to contempt and ridicule, for the purpose of introducing a *general* disregard of religion. And in *Woolston's* case the court desired it might be particularly noticed, that they laid stress upon the term *general*, and did not intend to include disputes between learned men upon controverted points.

There are no questions of more intense and

(b) See the trial of the publisher of Paine's Age of Reason. The learned counsel for the prosecution (Mr. Erskine) observed, "Every man has a right to investigate, with reason, controversial points of the Christian religion; but no man, consistently with a law which only exists under its sanctions, has a right to deny its very existence, and to pour forth such shocking and insulting invectives as the lowest establishments in the gradations of civil authority ought not to be subjected to, and which would soon be borne down by violence and disobedience if they were."

awful interest, than those which concern the relations between the Creator and the beings of his creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering, that society are more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous

abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt.

A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt (*c*), the offence against society is complete.

(*c*) Sir William Blackstone, in his Comment upon the Statutes cited below, observes, "It is clear that no restraint

The legislature has, nevertheless, deemed it proper to fortify the Common Law restraint by several penal enactments applicable to particular persons and cases. By statutes 1 Ed. 6. c. 1. and 1 Eliz. c. 1. s. 14. whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment.

By stat. 1 Eliz. c. 2. if any *minister* shall speak any thing in derogation of the book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, he shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived, and suffer imprisonment for life. And if any person whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks, for the second 400, and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate." 4 Bl. Com. 51.

By the 13 Eliz. c. 12. a person ecclesiastical, advisedly affirming any doctrine contrary to the articles established at a convocation, holden at London in the year 1562, is liable to deprivation, if he persist in his error.

By the 3 J. 1. c. 21. whoever shall use the name of the Holy Trinity profanely or jestingly in any stage play, interlude, or show, shall be liable to a penalty of £10.

By stat. 9 and 10 Will. 3. c. 32. if any person educated in, or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or assert or maintain that there are more gods than one, or deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or of any legacy or deed of gift, or to bear any civil or military office or benefice ecclesiastical, and shall suffer imprisonment for three years from the time of conviction (*d*).

(*d*) By sec. 2. no person shall be prosecuted under the act for words spoken, unless the information shall be given on oath before one or more justices within four days after such words spoken, and the prosecution shall be within three months after such information.

By the st. 53 G. 3. c. 160. s. 2. the provisions of the last cited act are repealed so far as they relate to persons denying, as therein mentioned, the Holy Trinity.

An offender against the st. 9 and 10 W. 3. c. 32. is still indictable at common law, for a statute inflicting a new punishment does not take away the old one, unless it change the offence or make it of a different nature (*e*).

(*e*) *R.* v. *Carlile*, 3 B. & A. 161. *R.* v. *Williams*, Howell's St. Tr. vol. 26, p. 656. 2 Str. 884. Barnard, K. B. 162. *R.* v. *Eaton*, 1815. In the case of the *King* v. *Carlile*, 3 B. & A. 161. the defendant having been convicted of a blasphemous libel on an information for an offence at common law, the court held, that the st. 9 & 10 W. 3. did not alter the common law offence, but merely gave a cumulative punishment. Best, J. in giving judgment, observed, so far from the statute of William containing provisions so inconsistent with the common law as to operate as a repeal by implication, as far as it applies to the offence of libel, it seems intended to aid the common law. It is called "An act for the more effectual suppression of blasphemy and prophaneness." It would ill deserve that name if it abrogated the common law, inasmuch as for the first offence it only operates against those who are in possession of offices or in expectation of them. The rest of the world might with impunity blaspheme God, and prophane the ordinances and institutions of religion, if the common law punishment is put an end to. But the legislature in passing this act had not the punishment of blasphemy so much in view, as the protecting the government of the country by preventing infidels from getting

And it seems that the st. 53 G. 3. c. 160. s. 2. does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity by the st. 9 & 10 W. 3. c. 32.; and therefore contumelious remarks on the character of Jesus Christ published with intent to impugn the authenticity of scriptures is still an offence at common law (*f*).

into places of trust. In the age of toleration in which that statute passed, neither churchmen or sectarians wished to protect in their infidelity those who disbelieved the Holy Scriptures; on the contrary, all agreed that as the system of morals which regulated their conduct was built on these scriptures, none were to be trusted with offices who showed they were under no religious responsibility. This act is not confined to those who libel religion, but extends to those who, in the most private intercourse by advised conversation, admit that they disbelieve the scriptures. Both the common law and this statute are necessary, the first to guard the morals of the people, the second for the immediate protection of the government.

The defendant was afterwards for this and another blasphemous libel, sentenced to pay a fine of £1500; to be imprisoned for three years and to find sureties for his good behaviour for the term of his life.

(*f*) *R.* v. *Waddington*, 1 B. & C. 26. K. B. Mich Term. 1822.

This was an information by the Attorney-General against the defendant for a blasphemous libel. The effect of the libel set out in the information was to impugn the authenticity of the scriptures, and one part of it stated that Jesus Christ was an impostor, and a murderer in principle, and

a fanatic. The defendant was tried at the last Middlesex Sittings after last Trinity Term and convicted. Before the verdict was pronounced, one of the jurymen asked the Lord Chief Justice whether a work which denied the divinity of our Saviour was a libel. The Lord Chief Justice answered that a work speaking of Jesus Christ in the language used in the publication in question, was a libel; Christianity being a part of the law of the land. The defendant in person now moved for a new trial, and urged that the Lord Chief Justice had misdirected the jury, by stating that any publication in which the divinity of Jesus Christ was denied was an unlawful libel; and he argued that, since the 53 G. 3. c. 160. was passed, the denying one of the persons of the Trinity to be God was no offence, and consequently that a publication in support of such a position was not a libel.

Abbott, C. J. I told the jury that any publication in which our Saviour was spoken of in the language used in the publication, for which the defendant was prosecuted, was a libel. I have no doubt whatever, that it is a libel to publish that our Saviour was an impostor and a murderer in principle.

Bayley, J. It appears to me that the direction of my Lord Chief Justice was perfectly right. The 53 G. 3. c. 160. removes the penalties imposed by certain statutes referred to in the act, and leaves the common law as it stood before. There cannot be any doubt that a work which does not merely deny the Godhead of Jesus Christ, but which states him to be an impostor and a murderer in principle, was at common law, and still is, a libel.

Holroyd, J. I have no doubt whatever, that any publication in which our Saviour is spoken of in the language used in the work, which was the subject of this prosecution, is a libel. The direction of the Lord Chief Justice was therefore right in point of law, and there is no ground for a new trial.

Best, J. My Lord Chief Justice reports to us, that he told the jury that it was an indictable offence to speak of Jesus

Christ in the manner he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 G. 3. c. 160. has made no alteration in the common law relative to libel. If previous to the passing of that statute it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. 3. c. 160., as its title expresses, is an act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 W. & M. Sess. 1. c. 18. exempted all Protestant dissenters except such as denied the Trinity; and the penalties or disabilities which the 9 and 10 W. 3. imposed on those who denied the Trinity. The 1 W. and M. Sess. 1. c. 18. is, as it has been usually called, An Act of toleration, or one which allows dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the established church and non-conformity to its rites. The legislature in passing that act, only thought of easing the consciences of dissenters and not of allowing them to attempt to weaken the faith of the members of the church. The 9 and 10 W. 3. was to give security to the government by rendering men incapable of office, who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office, and that penalty is incurred by any manifestations of dangerous opinions without proof of the intention in the person entertaining it, either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous libels. It is not necessary for me to say whether it be libellous to argue from the scriptures against the divinity of Christ;

that is not what the defendant professes to do,—He argues against the divinity of Christ by denying the truth of the scriptures. A work containing such arguments published maliciously (which the jury in this case have found) is by the common law a libel, and the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law.

Rule Refused.

CHAPTER VII.

Of Publications tending to subvert Morality.

IT is now fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal courts; though some doubt, as will appear from a brief review of the cases, seems formerly to have been entertained upon this subject.

Sir Charles Sedley (*a*) was indicted for having exposed his naked body in a balcony in Covent Garden, and for having committed other indecent acts before a great multitude of people. The indictment was openly read to him in court; and afterwards, on being required to take his trial at bar, he submitted to it. From the different reports of this case it appears, that after the abolition of the Star-chamber, the Court of King's Bench was considered as the custos morum, to whom the cognizance of such offences most properly belonged; and although it was afterwards contend-

(*a*) Keb. R. 720. 2 Str. 791. Foster, 99. Mich. 15 C. 2.

ed, that judgment was given against the defendant, on account of the personal violence he used in throwing down bottles upon the mob, yet from the language of the reporters it clearly appears, that the Judges considered the offence to have been committed against modesty and good manners, and found it necessary to interfere in those profligate times (*b*) to punish such immodest practices, which the court said were as frequent, as if not only Christianity but morality also had been neglected.

Hill (*c*) was indicted for publishing some obscene poems of Lord Rochester tending to the corruption of youth, but going abroad he was outlawed.

Read (*d*) was indicted for publishing a lascivious and obscene libel, and was tried and convicted before Ld. Holt, C. J. It was moved in arrest of judgment, that the offence was merely of spiritual and not of temporal cognizance; Ld. Holt was of opinion, that the offence ought to be punished in the Ecclesiastical Court, and that the

(*b*) During those licentious times, it appears to have been of little use to convict offenders of this description; for though there were many prosecutions against the players for immodest plays, they had interest enough to get the proceedings stayed before judgment. Frem. Ent. 209, 213, 214, 215.

(*c*) Str. 790. Dig. L. L. 60. Mich. 10 W. 3.

(*d*) Easter, 6 Ann. Fost. Rep. 98, 99.

temporal Courts could not interfere, since there was no precedent for it (*e*); and Powell, J. regretted that it was not punishable at Common Law, since it certainly tended to the corruption of manners. And it does not appear, that any judgment was ever pronounced against the defendant (*f*).

The Attorney-general exhibited an information against Curl, for printing and publishing an obscene book, intituled, "Venus in the Cloister, or the Nun in her Smock." The defendant having been found guilty, it was moved in arrest of judgment, that the offence was of mere spiritual cognizance, that in the reign of Charles II. there was a run of obscene writings, for which no prosecutions were instituted in the temporal courts, and *Read's* case was cited.

It was answered by the Attorney-general (*g*), that to destroy morality is to destroy the peace of government, since government is no more than public order; that the Spiritual Courts punish only spiritual defamation *by words*, but that if it be reduced to writing, it is a temporal offence punishable as a libel.

The Judges had some difficulty at first in giving judgment against the defendant, chiefly

(*e*) Sir C. Sedley's case seems to be a precedent in principle.
(*f*) 2 Str. 792. (*g*) Sir Philip Yorke.

on account of *Read's* case; but afterwards they gave it as their unanimous opinion, that this was a temporal offence. They said, it was plain, that the force used in *Sir C. Sedley's* case was but a small ingredient in the judgment of the Court, who fined him £2000. And that if the force was all they went upon, there was no occasion to talk of the Courts being custos morum of the King's subjects; that if *Read's* case were to be adjudged, they should rule it otherwise; and, therefore, gave judgment for the King.

An information (*h*) was granted against John Wilkes, for printing and publishing an obscene and impious libel, entituled "An Essay on Woman." Upon which he was convicted, and sentenced to pay a fine of £500, to be imprisoned for twelve months, and to find security for his good behaviour for seven years.

Ever since the decision in Curl's case, it seems to have been settled, that any publication tending to the destruction of the morals of society, is punishable by indictment; and a great number of convictions have since taken place, for publishing and vending immodest books and pictures.

With respect to the extent of the offence and mode of publication.

Although many vicious and immoral acts are

(*h*) 4 Burr. 2527.

not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences (*i*) of a public nature. In the cases referred to, with the exception of *Sir C. Sedley's*, the defendants were indicted for printed libels; the principle, however, of those cases, and the express decision in *Sir C. Sedley's*, seem to comprehend other indecent and immoral communications, especially when made before a large assembly, such as the performance of an obscene play, which offence, it seems, has formed the ground of many prosecutions (*k*).

By the stat. 3 G. 4. c. 40. s. 3. all persons openly exposing or exhibiting in any street, road, public place, or highway, any indecent exhibition, or openly and indecently exposing their persons, shall be deemed rogues and vagabonds within the meaning of the act.

(*i*) Sid. 168. (*k*) Str. 790.

CHAPTER VIII.

Publications against the Constitution, &c.

IT seems to be clear beyond dispute, that any member of the state has a right to suggest improvements in the constitution (*a*), and to point out what he conceives to be defects, and that though he be mistaken, he does not offend criminally, unless he be actuated by an intention to work mischief, evidenced by the licentious and insulting manner in which he treats of the established constitution and ordinances of the country. These, so long as they exist, ought to be secured from contumely and insult, least men's minds should be excited on the one hand to effect a hasty and ill judged demolition of the political fabric, or on the other should be provoked to acts of vio-

(*a*) Lord Loughborough, in the debate upon the Libel Bill, observed, "Every man may publish, at his discretion, his opinions concerning forms and systems of government; if they be wise and enlightening, the world will gain by them—if they be weak and absurd, they will be laughed at and forgotten—if they be *bonâ fide*, they cannot be criminal however erroneous."

lence in defence of a political establishment which they hold in reverence.

It is necessarily incident to every permanent form or system of government to make provision not merely for its continuance, but for its secure continuance. To that security the confidence and esteem of the people is indispensable, and therefore it is essential to prohibit malicious attempts to produce the mischiefs of political revolution, by rendering the established constitution odious to the society which has adopted it.

By the 13 Eliz. c. 1. it is a misdemeanor, punishable with forfeiture of goods and chattels, for any person to hold, affirm, or maintain, that the common laws of the realm, not altered by parliament, ought not to direct the right of the crown of England.

By the 6th Ann. c. 7. s. 7. it is made high treason to affirm by writing, or printing, that the king is not the lawful and rightful king of the realm, or that any other person has title to the same otherwise than according to the Bill of Rights, the Act of Settlement, and the Act of Union, or that parliament has not authority to limit the descent of the crown.

One of the earliest cases in which an opinion given upon the indictable quality of words abstractedly reflecting upon the constitution, appears to have been given in the forty-first year of

Elizabeth; where it was adjudged, that no indictment lay for saying that the laws of the realm were not the laws of God, because true it is they are not the laws of God; but that it would be otherwise to say that the laws of the realm are contrary to the laws (*b*) of God.

In the 15th (*c*) year of Ch. II. Brewster was a second time convicted for printing and publishing a libel, called "The Phœnix; or the solemn League and Covenant," in which it was declared, that a king abusing his power may be opposed; that if he attempt to enforce his encroachments by arms, he may be resisted, because he has violated the contract and covenant made between himself and the people, and that the breaking this covenant was a greater sin than breaking a commandment.

Harrison (*d*) was convicted on an information charging him with having published concerning the government of England, and the traitors who adjudged King Charles I. to death; that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. It was moved in arrest of judgment, that there can be no rebellion

(*b*) 2 Roll. Ab. 78.

(*c*) Hil. 15 Ch. 2nd. K. B. Dig. L. L. 72.

(*d*) *R.* v. *Harrison*, 3 Keb. 841. Ventr. 324. Dig. L. L. 66.

against the king, but it must be against the three estates, who are all united in the king. But the court overruled the objection, since by 13 C. 2. c. 1. it is expressed, that neither one nor both Houses of Parliament can make war against the king, under any pretence whatever; and that though there be three estates as to making laws, there is but one authority as to war.

And the court supposing that the words tended to set on foot the position upon which the war, levied in 1641 by the two houses against the king, was grounded, were much displeased that counsel would undertake to defend them.

The king had judgment, and the defendant brought error in parliament.

So a treatise upon hereditary right has been held to be a libel, though containing no reflection upon the existing government (*e*).

Tutchin was convicted (*f*) for publishing, in a paper called the Observator, that there were mismanagements in the government; that for such they had a right to call their governors to account, to displace the ministers, dethrone the reigning sovereign, and to transfer their allegiance to whom they pleased.

Dr. Browne (*g*) was convicted for writing a

(*e*) The *Queen* v. *Bedford*, 2 Str. 789.
(*f*) 2 Ld. Ray. 1061. Salk. 51. 6 Mod. 268.
(*g*) 11 Mod. 86.

libel, entitled "Mercurius Politicus," which asserted, that "the late revolution was the destruction of the laws of England."

Richard Nutt (*h*) was convicted, upon an information, for publishing a libel, entitled "The London Evening Post," in which it was suggested, that the revolution was an unjust and unconstitutional proceeding; and the limitation established by the act of settlement was represented as illegal; and it was asserted that the revolution and settlement of the crown, as by law established, had been attended with fatal and pernicious consequences to the subjects of this kingdom.

In the prosecutions of Shebbeare, upon an information for a libel, and of Thomas Paine, on an information for a similar offence, one ingredient, though mixed up with many others, was an attack upon the justice and policy of the revolution, representing it as the origin and foundation of many political evils and calamities (*i*).

(*h*) Dig. L. L. 68. 27 G. 2.

(*i*) An information was exhibited by the attorney-general against the defendant for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, intituled "A Sixth Letter to the People of England, on the Progress of National Ruin, in which it is shown that the present grandeur of France and the calamities of this Nation are owing to the influence of Hanover on the Councils of England," tending to traduce the revolution, and to represent it as the

So far as to publications which principally concern abstractedly the political establishment and constitution of the state; another class, and one

foundation of all those imaginary evils and calamities which he, the said defendant, would falsely insinuate the subjects of this kingdom did labour under, and also to asperse the memory of King William the Third and of King George the First, and to represent the public measures which were taken and pursued during the course of their respective reigns, as wicked, corrupt, and fatal measures to this kingdom, and also to asperse, scandalize, and vilify the late king and his administration of the government of this kingdom, and to make it thought that the public affairs of this kingdom were in the most unhappy and declining state, and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies, and also to insinuate that the late king had no concern for the people of England, nor any regard for the interest, honour, or welfare of this kingdom, but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the electorate of Hanover and his German dominions.

The defendant was found guilty of this libel, was fined £5., sentenced to the pillory, and imprisoned three years. Hilary Term, 31 Geo. 2. 1758. K. B. MSS. The *King* v. *Dr. John Shebbeare.*

The *King* v. *Paine.* This was an information against the defendant, filed by the attorney-general, as the author and publisher of a malicious libel, the tendency of which was "to traduce and vilify the late happy revolution, the settlement of the crown and regal government, as by law established, and also the Bill of Rights, the legislature, government, laws, and parliament of this kingdom." The libel likewise contained many seditious and scandalous reflections upon his present

much more strongly and frequently tending to produce public irritation and disorder, consists of malicious publications of a more personal nature, affecting either the king or his government, or ministers of justice, or either house of parliament, and tending to render them odious or contemptible.

Words (*k*) spoken, have frequently been deemed overt acts of treason for which the speakers have suffered. Two persons were executed for unguarded expressions in the reign of Edward IV. the one a citizen, who said he would make his son heir to the Crown (alluding to the sign of the house in which he lived)—the other, a gentleman, whose favourite buck the king killed in hunting, whereupon the owner wished it horns and all in the belly of him who had counselled the king to kill it, and the king being his own counsellor on the occasion, the words were con-

majesty. This libel was tried before Lord Kenyon and a special jury, who, immediately after a speech from Mr. Paine's counsel, pronounced the defendant guilty, without any address or direction from the judge.

The defendant never appeared to receive the judgment of the court, and was consequently outlawed. 32 Geo. 3. K. B. 1792. MS. The *King* v. *Paine*.

(*k*) Hale's Pl. Cro. C. 115. See also *Hugh Pine's* case, Cro. Car. 117. where other capital convictions for speaking words in that reign are cited.

strued into a treasonable expression against the king himself.

In the reign of Henry the Eighth, not only was a peer of the realm charged with having uttered treasonable words, which at most amounted to slander of his ministers, but a gentleman was charged with having *treasonably* expressed his displeasure at such proceedings (*l*).

But in less arbitrary times, the legality of such proceedings has been much questioned; and the rigour of the doctrine has at all events been greatly mitigated. It has been most humanely observed (*m*), that words may be spoken in heat,

(*l*) Surrey, anno tricesimo Henrici Octavi Henricus Marchia, Exon *proditorie* dicebat. *I like well of the proceedings of Cardinal Pool*, et ulterius. *But I like not the proceedings of this realm, and I trust to see a change of the world*, et ulterius. *I trust once to have a fair day upon those knaves which rule about the king*, et ulterius. *I trust to give them a Buffet one day.* Et quod Nicolaus Carew, Miles, malitiosè, *murmuravit* indignatus fuit, et dicebat hac verba Anglicana. *I marvel greatly that the indictment against the Lord Marquesse was so secretly handled, and to what purpose, for the like was never seen.* See *Hugh Pine's* case, Cro. Car. 117. where these and a number of other precedents were collected and considered by the judges.

It is well known that, under the pretext that scandal of the magistrates amounted to the *crimen læsæ majestatis*, Sylla, Tiberius, and others, committed many assassinations at Rome.

(*m*) 4 Black. Comm. 79.

without any intention; or be mistaken, perverted, or misremembered by the hearer; their meaning depends always on their connection with other words and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence is more expressive than any discourse. Since, therefore, there can be nothing more equivocal and ambiguous than words, it would be unreasonable to make them amount to high treason. Of this opinion were Stamford, Ld. Coke, Ld. Hale (*n*), Sir Michael Foster (*o*), and Sir William Blackstone (*p*), whose opinion has just been cited; and in the reign of Charles the First, some very atrocious words having been spoken concerning the king by one Pine, all the judges certified, that "though the words (*q*) were as wicked as they might be, yet that they were no treason; for unless it be by some particular statute, no words will be treason."

It seems to be clear (*r*), however, that words joined to au act may explain it, and that words of persuasion to kil[the king, or manifesting an

(*n*) 1 Hale, 111, 323.

(*o*) Fost. Cr. L. 200.

(*p*) 4 Bl. Com. 80.

(*q*) Cro. Car. 125. See Haw. Pl. Cr. c. 17, s. 32, 33, 34, 35, &c. Fost. Cr. L. 200. 1 Hale, 111, 323.

(*r*) Haw. Pl. Cr. c. 17, s. 37. Fost. 202.

agreement, or consultation, or direction, to that purpose, are sufficient overt acts of compassing his death.

It has frequently been held, that words committed to print or writing, and published, amount to an overt act of treason, in proof the compassing the king's (*s*) death; but even in such case it seems that a publication is necessary, though in arbitrary times, the contrary has been adjudged, particularly in the instances of Peachum (*t*), a clergyman, and of Algernon Sydney (*u*); the former of whom was convicted for treasonable passages in a sermon never preached, and the latter for some speculative opinions contained in papers discovered in his private closet; but so unsatisfactory did the grounds of these convictions appear, that Peachum was not executed, and the attainder of Sydney was reversed.

The character and title of the sovereign are guarded by the following legislative provisions. The st. 3 Ed. 1. c. 34. (*x*) enacts, that none be

(*s*) 2 Roll. 89, 90. Fos. 346. 11 Modern, 322. 1 St. Tr. 977. 3 St. Tr. 228. 5 Bac. Abr. 117.

(*t*) Cro. Car. 125.

(*u*) Foster, 198.

(*x*) The stat. 3 Ed. 1. c. 34. and 2 R. 2. st. 1. c. 5. touching telling of news, were confirmed by the stat. 1 and 2

so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, may grow between the king and his people, or the great men of the realm (*y*).

Phil. and Mary, c. 3. (since expired) which enacted, that justices of peace in every shire, city, &c. shall have authority to hear and determine the said offences, and to put the said two statutes in execution. And that if any person shall be convicted or attainted for speaking maliciously, of his own imagination, any false, seditious, and slanderous news, saying, or tales of the king or queen, then he shall for his first offence be set on the pillory in some market place near where the words were spoken, and have both his ears cut off, unless he pay to the queen an hundred pound within one month after judgment given, and also shall be three months imprisoned, and if he shall speak any such slanderous and seditious news or tales, of the speaking or report of any other, then he shall be set on the pillory, and have one of his ears cut off, unless he pay an hundred marks to the queen's use within one month after, and shall be one month imprisoned; and if he shall do it by book, rhyme, ballad, letter, or writing, he shall have his right hand stricken off. And if any person being once convicted of any of the offences aforesaid, do afterward offend he shall be imprisoned during his life, and forfeit all his goods and chattels. And see 4 & 5 Ph. & M. c. 9. 1 Eliz. c. 6. (now expired.)

(*y*) See the stat. 1 W. and M. st. 2. c. 2. s. 9. By a statute in the reign of H. 8. it was made high treason to write or devise by words, or in writing, or to imagine, invent, or attempt any bodily harm, to be done to the king, the queen, or their heirs apparent. By a statute of Elizabeth, it was made high treason to intend destruction or bodily harm to the queen, or

By 6 Ann. c. 7. s. 7. it is made high treason to affirm, by writing or printing, that the king is not the lawful and rightful king of the realm, or that any other person has title to the same, otherwise than according to the Bill of Rights (*y*), the Act of Settlement (*z*), and the Act of Union, or that parliament has not authority to limit the descent of the crown.

By the 36th Geo. 3. c. 7. it is enacted, that if any person shall imagine or intend death, destruction, or any bodily harm to the person of the king, or to depose him, or to levy war, in order by force to compel him to change his measures or counsels, &c. and shall express and declare

to affirm that the laws and statutes do not bind the right of the crown, and the descent, limitation, inheritance, and government thereof.

And whosoever shall, during the queen's life, by any booke or worke, written or printed, expressly affirm, before the same be established in parliament, that any one particular person is, or ought to be heir and successor to the queen, except the natural issue of her body, shall, for the first offence, be a whole year imprisoned, and forfeit half his goods; and for the second, shall incur the penalties of a præmunire. These laws expired on the demise of that queen. By an act in the reign of Ed. 6th, which expired with that king, it was made high treason to assert in print or in writing, that he was not supreme head of the church.

(*y*) See note (*y*) ante, p. 170.

(*z*) 12 and 13 W. 3. c. 2.

such intentions by *printing, writing,* or any overt act, he shall suffer death as a traitor.

And that if any one by writing, printing, preaching, or other speaking, shall use any words or sentences to incite the people to hatred and contempt of the king, or of the government and constitution of this realm, he shall receive the punishment of a high misdemeanor; that is, fine, imprisonment, and pillory, and for a second offence, he is subject to a similar punishment, or transportation for seven years, at the discretion of the court. The time of prosecution under the act is limited to six months, and the statute does not affect any prosecution at common law, unless a prosecution be previously commenced under the statute.

At common law, any contempt of the king's person amounts, on principles of policy too obvious for observation or comment, to a high misdemeanor. Such a contempt may either consist in the imputing to him the want of capacity or integrity (*a*), in charging him with a breach of his coronation oath (*b*), cursing him, wishing him ill, spreading false rumours concerning his intentions (*c*),—or, in short, by maliciously asserting

(*a*) Hawk. P. C. c. 23. 4 Bl. Com. 120.
(*b*) Noy, 105. Haw. Pl. Cr. c. 23. s. 5.
(*c*) See 3 E. 1. c. 34.

any thing concerning him; which tends to lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people. These are considered as high contempts and misprisions, and are punishable as misdemeanors at common law.

So to deny the king's title to the crown, or to raise doubts concerning it, in unadvised discourse, would amount to a contempt at common law; and to do it deliberately and advisedly, if it did not constitute treason, would at least subject the offender (*d*) to the penalties of a præmunire.

In the reign of Elizabeth (*e*), all the Justices and Barons of the Coif assembled in Serjeant's Inn, concerning a book, devised by one Brown, containing the following passage, "Every preacher runneth to the queen now, as though he were to be directed by her to tarry for reformations to be had for matters of the church. If the magistrates will agree, all is well; if they will not, they are not of the church, and it is a shame to tarry for them, or for a parliament, or proclamation." And it was held by all, that this was a moving of insurrection and sedition (*f*).

(*d*) Black. Comm. 123. Haw. Pl. Cr. c. 17. s. 35. supra 171.

(*e*) Dig. L. L. 65.

(*f*) The question proposed was, whether the publication

In the Digest (*g*) of the Law of Libel it is said, that at the same meeting, Sir Edmund Anderson, Ch. J. of the Common Pleas, propounded the following case to his brethren:—A person had caused the arms of the queen to be painted upon a post in a church in Suffolk, with this inscription painted near them, "I know thy works, that thou art neither hot nor cold; I would thou wert either hot or cold: therefore, because thou art lukewarm, it will come to pass that I will spew thee out of my mouth." But the justices came to no resolution.

John Wilkes (*h*) was convicted upon an information filed by the attorney-general (*i*), for printing and publishing a malicious libel, entitled The North Briton, No. 45, tending to vilify and traduce the king and his government—to impeach and disparage his veracity and honour—and to represent and make it believed that his majesty's most gracious speech, delivered from his throne to the parliament, on Tuesday the 19th day of April, 1763, contained many falsities and gross

was an offence within the 23d Eliz. c. 2. which was a temporary stat.; but under the construction which the judges put upon this book, it was a libel at common law.

(*g*) D. L. L. 66. Sav. 49.

(*h*) Dig. L. L. 69. Informations were also filed against Kearsley and Williams, for printing and publishing the same.

(*i*) Charles Yorke, Esq.

impositions upon the public; and that his majesty had suffered the honour and dignity of his crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the king and his government contemptible and odious, and to excite tumults, commotions, and insurrections, &c. &c.

An information (*k*) was filed by the attorney-general against the printer and proprietor of the Morning Chronicle newspaper, for publishing the following paragraph, with a malicious intent to alienate from the king the affections of his subjects:—"What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system. Of all monarchs, indeed, since the revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular."

Lord Ellenborough, C. J. in summing up to the jury, observed, "The first sentence admits of an innocent interpretation—'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system.' The fair meaning of the expression, 'change of system,' I think, is a change of political system, not a change in the

(*k*) *R.* v. *Lambert and Perry*, 2 Camp. 398.

frame of the established government, but in the measures of policy which have been for some time pursued. By total change of system, is certainly not meant subversion or demolition; for the descent of the crown to the successor of his majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the Prince of Wales; and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now I do not know that merely saying, there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his majesty, and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning sovereign. He may be misled by the ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know of but one

Being to whom error may not be imputed. If a person who admits the wisdom and virtues of his majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous: but it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate, that his majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of government obtains under his majesty's reign, I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: 'Of all the monarchs, indeed, since the revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' This is more equivocal, and it will be for you, gentlemen of the jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more

severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean, that his majesty is actuated by improper motives? or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only meant that his majesty, during his reign, or any length of time, may have taken an imperfect view of the interest of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel. The extract read at the request of the defendants, does seem to me too remote, in point of situation, in the newspaper, to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to show the innocence of the whole. It speaks of that which every body in his majesty's dominions knows—his majesty's solicitude for the happiness of his people; and it expresses a respectful regard for his paternal virtues. What connection it has with the passage set out in the information, it is for you to determine. Taking that passage substantively, and by itself, it is a

matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants guilty. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention; or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place, and disjoined by other matter, you infer from that connection that this was written without any purpose to calumniate the personal government of his majesty, and render it odious to his people, you will find the defendant not guilty. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning, as they impress your minds. What appears to me most material is the substantive paragraph itself; and if you consider it as meant to represent that the reign of his majesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus to render his

majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means, distinctly, according to your reasoning, to impute any purposed mal-administration to his majesty or those acting under him, but may be fairly construed an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men. I will take the instance of a man, who for a time administered the concerns of this country with great ability, although he gained his elevation with great crime, I mean Oliver Cromwell. We are at this moment suffering from a most erroneous principle of his government, in turning the balance of power against the Spanish monarchy, in favour of the House of Bourbon. He thereby laid the foundation of that ascendency, which, unfortunately for all mankind, France has since obtained in the affairs of Europe. The greatest monarchs who have ever reigned—monarchs who have felt the most anxious solicitude for the welfare of the country, and who have in some respects been the authors of the highest blessings to their subjects, have erred; but could a simple expression of regret for any error they had committed, or an earnest wish to see that error corrected, be consi-

dered as disparaging them, or tending to endanger their government? Gentlemen, with these directions, the whole subject is for your consideration. Apply your minds candidly and uprightly to the meaning of the passage in question: distort no part of it for one purpose or another, and let your verdict be the result of your fair and deliberate judgment (*l*)."

In the case of the *King* v. *Harvey* (*m*), it was held to be an indictable offence to publish falsely of the king, or of any other person, that he laboured under mental derangement. The libel was as follows:—"Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state, that the malady under which his majesty labours is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the king's illness. At the trial, before Abbott, C. J. at the London Sittings after last term, the publication of the libel was proved in the usual manner, and it was admitted, by the counsel for the defendants, that the libel imported that the king laboured under insanity, and that that assertion was untrue; but it was urged to the jury that the defen-

(*l*) The defendant was acquitted.

(*m*) 2 B. and C. 257.

dants believed the fact to be true, and that they were warranted in so doing, by rumours which had been very prevalent on the subject. The Lord Chief Justice, in his address to the jury, after stating the import of the publication, proceeded as follows:—"To assert falsely of his majesty, or of any other person, that he labours under the affliction of mental derangement, is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning his majesty, by reason of the greater mischief that may thence arise. It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false, in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority, and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion, the publication is a libel calculated to vilify and scandalize his majesty, and to bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do. The jury found the defendants guilty (*n*).

(*n*) After the jury had retired about two hours, they re-

Next as to libels on the government: it is the undoubted right of every member of the com-

turned into court, and the foreman said that the jury wished to have the opinion of the Lord Chief Justice, whether it was or was not necessary that there should be a malicious intention to constitute a libel. To this question the Lord Chief Justice returned the following answer:—"The man who publishes slanderous matter, calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary, and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book, containing libellous matter, to a magistrate; but the general rule is, that a person must be taken to have intended to do that which his act is calculated to effect." The jury again retired for about three hours, and then returned a verdict of guilty, but recommended the defendant to mercy. A motion was afterwards made for a new trial, upon the ground of a supposed misdirection on the part of the Chief Justice, but the court were of opinion, that his direction was right, that the assertion that the fact was communicated from authority where it turned out to be false, was a false statement, and that such a communication being in itself mischievous and injurious, malice must necessarily be inferred, since a party must, in point of law, be considered to have intended that which is the natural consequence of what he does. See *R.* v. *Creevy*, 1 M. and S. 273. supra. *R.* v. *Farrington*, 2 Russ. 1675. *R.* v. *Mazagora*, Bayley on Bills, 443. Russ. and Ry. C. C. L. 291. See further, as to contempts against the king, Cro. J. 38. and the case of *A. Scott*, for publishing false news. O. B. June Sess. 1788. Haw. P. C. c. 23. s. 4.

munity to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; when this boundary is overstepped, and the license is abused either for the wanton gratification of private malice, in aiming a stab at the private character of a minister, under colour and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy and contumely, under pretence of exposing defects and correcting errors, but, in reality, for the purpose of obstructing and impeding the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal. It has justly been observed that the life of government is reputation, an administration destitute of the support and encouragement to which the good opinion of the people is essential, must necessarily be timid and in-

decisive, and consequently weak and ineffectual.

It has been asserted by high authority (*o*), that "every freeman has an undoubted right to lay what he pleases before the public—to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."

On the trial of James Perry and another (*p*), on an information for a libel, the attorney-general, in his opening to the jury, observed, "From the bench you will hear laid down, from the most respectable authority, the law which you are to apply to those facts. The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out

(*o*) 4 Bl. Comm. 151.

(*p*) Before Ld. Kenyon, 1793. See Ridgway's Collection, &c. 2 vol. 371.

what he may honestly conceive to be grievances, nor for proposing legal means of redress."

It would exceed the proposed limits of this treatise, to cite cases in detail under this division; every case, indeed, falling within it, is too intimately involved in its particular circumstances to admit of any abstract rules less general than the elements which have been laid down as essential to such an offence, the plain intrinsic tendency (*q*) of the communication to produce public disorder, and the malicious intention of its author (*r*).

(*q*) See *R.* v. *Beare*, 12 Mod. 221. Ld. Ray. 418. Dig. L. L. 19, 121. *R.* v. *Bedford*, 2 Str. 789. *Rex* v. *Owen*, K. B. MSS. Dig. L. L. 67. *R.* v. *Lawrence*, 12 Mod. 311. *R.* v. *Bliss*, clerk, K. B. MSS. 5 G. 1. Dig. L. L. 122.

(*r*) A person delivered a ticket up to the minister after a sermon, wherein he desired him to take notice, that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. This was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered these vices knowingly. And the ground of the conviction has been stated to be, that general misrepresentations of the government or state of the nation, or mutinous hints, tend to excite discontent and sedition in the people, and that the generality of the reflection made it the more dangerous, since it had a bad effect on the whole frame of government. Sid. 219. Rol. 773. Bac. Ab. tit. Libel, 450.

Lawrence was convicted upon an information charging him with having sent a letter to Sir John Pigot, desiring him to

moderate his zeal, for that the king (meaning King James II.) would soon be restored; and that for further satisfaction herein, he would soon hear that many lords would repair to him to France, what to do he might guess. The defendant was fined forty marks. 12 Mod. 311. Dig. L. L. 121.

John Tutchin was convicted upon an information for publishing several libels containing the following paragraphs:—

"If we may judge by our national miscarriages, perhaps no nation has felt the influence of French gold more than England; and worthy it is our greatest lamentation, that our dear country should be thus weakened by men of mercenary principles, when countries, inferior to us in strength and riches, are secured from attempts of this nature only by the fidelity of their people. What is the reason that French gold has not affected Holland as well as England, but that their ministry is such as is entirely in the interest of their country, and altogether incorruptible. They prefer men that are knowing in their posts, and are active in business, when in England we find out offices for men, and not men for offices. By this, and by preferring men by interest and favour, have the excise, the customs, and other branches of the revenue, intolerably sunk, and by this means has the navy of England, our chief support, been hitherto perfectly bewitched. And can Lewis spend his money better, than in getting men into office in England, who are either false or ignorant in the business, or who are his friends."

Ld. Holt, C. J. in summing up to the jury, observed, "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government, than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be

safe unless it be punished. Now you are to consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government." 5 St. Tr. 532. A. D. 1704.

John Clarke was found guilty upon an information, charging him with having printed and published a malicious libel, intituled "Mist's Weekly Journal," containing false, malicious, and seditious reflections on his late and present majesty, by drawing odious parallels, and thereby maliciously and falsely insinuating our government to be tyrannical, and the ministry corrupt and abominable. 9 St. Tr. 273. A. D. 1729.

Richard Franklin was found guilty upon an information, charging him with having printed and published a malicious libel, intituled "No. 235, The Country Journal, or the Craftsman," containing an extract from a private letter from the Hague, with intent (*inter alia*) to scandalize and vilify the administration of his majesty's government of this kingdom, and his principal officers and ministers of state as persons of no integrity and ability, and as enemies to the public good of this kingdom.

The information stated, "That a treaty of peace having been concluded between his Majesty George the Second and the Kings of France, Spain, &c. and that the defendant well knowing the premises, &c. and contriving to disturb the happy state of the public peace and the tranquillity of the kingdom, &c. and to bring his present majesty's treaty of peace into contempt and disgrace, and also to detract, scandalize, traduce, and vilify the administration of his present majesty's government of the kingdom, and his principal officers and ministers of state, and to represent them as persons of no integrity or ability, and as enemies of the public good of the kingdom, &c. The information then proceeded to the publication of the libel, and set out the libellous matter, which was to the effect of the above allegations.

The defendant's counsel were Mr. Fazakerley and Mr. Boo-

tle. After the evidence had concluded on the part of the crown, Mr. Fazakerley offered to prove some of the contents of the libel to be true. He was immediately interrupted by Lord Raymond, Lord Chief Justice,—"As for your saying that you can prove what is charged on the defendant to be true, it is my opinion that it is not material whether the facts charged in a libel be true or false, if the prosecution be by indictment or information, and that writing and printing may be libellous, though the scandal is not charged in direct terms, but only ironically." His lordship added, "even a private man's character is not to be scandalized, either directly or indirectly, because there are remedies appointed by law, in case he has injured any person without maliciously scandalising him in his character. And much less is a magistrate, minister of state, or other public person's character to be stained, either directly or indirectly. And the law reckons it a greater offence, when the libel is pointed at persons in a public capacity, as it is a reproach to the government to have corrupt magistrates, substituted by his majesty, and tends to sow sedition and disturb the peace of the kingdom. Therefore I shall not here allow of any evidence to prove that the matters charged in this libel are true, for I am only abiding by what has been formerly done in other cases of the like nature."

The observations of Sir Philip Yorke, attorney-general, on the part of the prosecution, seem to have been afterwards adopted by the court. He observes, "There is another thing mentioned, which is, that if this Hague letter was construed a libel, it would tend to the utter destruction of the liberty of the press. My lord, I am really at a loss to know what sort of a liberty they mean. I hope they do not mean a licentious and unbounded liberty to libel and scandalize his majesty or his principal officers and ministers of state, or his magistrates, or even any of the meanest of his subjects, whenever they think fit. Gentlemen, I would have you to know that even the prerogative of the king is founded upon law, and limited by it,

and so are all things relating to his subjects, and it cannot be supposed that a printer only is exempted, and at liberty to use his press for what purposes he pleases. If he is, I desire that the defendant's counsel would point out that law. No, the law is not so absurd as to allow such a liberty of the press. The liberty meant is to be understood of a legal one. He may lawfully print and publish what belongs to his own trade, but he is not to publish any thing reflecting on the character and reputation and administration of his majesty or his ministers, nor yet to stain the character or reputation of any of his subjects. For, as I said before, to scandalize and libel people is no part of his trade; so I say it is only that liberty of the press which he is to use that is regulated by law and subjected to it, and if he breaks that law, and exceeds that liberty of the press, he is to be punished for it, as well as for breaking other laws or liberties. And, gentlemen, though it has been insinuated to you, from the other side, that the making such things a libel came from the Star Chamber, yet I must tell you, that printing such defamatory expressions or slanderous news was deemed a libel, and punished accordingly, long before the Star Chamber. It is a law made in 1275, in the third of King Edward the First, intituled 'An Act that none shall report slanderous news, whereby discord shall arise,' &c. &c. So, gentlemen, you see that this law of libel is not a new law, or one that came from the Star Chamber, but one that has been almost of five hundred years standing; therefore I hope you will not suffer yourselves to be amused by such things. The Court of Star Chamber punished without juries, but though juries were taken away, yet the law remained the same as to libels and crimes. So I hope it appears to you to be very plain, that the liberty of the press is limited and governed by law, and that the law sets limits both to the king and his subjects."

The defendant, after a charge from the chief justice, who admitted the full force and propriety of the attorney-general's

address, was found guilty. The term following, he was sentenced to pay a fine of £800, to be imprisoned for one year, and to find security for his good behaviour for seven years, &c. No arrest of judgment was ever moved for, or writ or error brought upon the record.—State Trials, vol. 9, p. 255.

The *King* v. *Horne*.—This was an information filed against the defendant by his majesty's attorney-general, on behalf of his majesty, for writing, printing, and publishing two libels.

The first count of the information stated, that the said John Horne being a wicked, malicious, seditious, and ill disposed person, and being greatly disaffected to our said present sovereign lord the king, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said majesty's subjects from his said majesty, and to insinuate and cause it to be believed, that divers of his said majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony, or plantation of the Massachusett's Bay in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said majesty's subjects in the said province, colony, or plantation, to resist and oppose his majesty's government, on the 8th day of June, in the 15th year of the reign, &c. with force and arms, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government, and the employment of his troops, according to the tenor and effect following :—"King's Arms Tavern, Cornhill, June 7th, 1775. At a special meeting, this day, of several members of the Constitutional So-

ciety, during an adjournment, a gentleman proposed that a subscription should be immediately entered into, (by such of the members present who might approve the purpose,) for raising the sum of £100, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the province of Massachusett's, (meaning the said province, colony, or plantation of Massachusett's Bay in New England, in America,) on the 19th of last April, which sum being immediately collected, it was thereupon resolved that Mr. Horne (meaning himself the said John Horne,) do pay to-morrow into the hands of Messieurs Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. John Horne (meaning himself the said John Horne,) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown, and dignity."

There were other counts in the information, charging the said John Horne with causing the same libel to be printed in the London Packet, or New Lloyd's Evening Post, and the Morning Chronicle, or London Advertiser.

The defendant pleaded—Not guilty.

The information was tried at the Sittings in London after Trinity Term, 1777, before Lord Mansfield, by a special jury, and the defendant found guilty of all the offences charged in the information.

The Court of K. B. afterwards passed the following sentence upon Mr. Horne:—"To pay a fine of £200, to be imprisoned one year, and to give securities for his good behaviour for three years." Afterwards the defendant brought a writ of

error in the House of Lords, but the judgment of the King's Bench was affirmed. Cowp. Rep. 672. and 11 St. Tr. 264.; see also *R.* v. *Burdett*, 4 B. and A. 115, 314.

The *King* v. *Cobbett*.—This was an information filed by the Attorney-general against the defendant, for a libel published in the "Weekly Register," in the form of a letter signed *Juverna*. It was a libel upon the administration of the Irish government and upon the public character and conduct of the Lord Lieutenant and Lord Chancellor of Ireland. Mr. Cobbett was not the author, but merely the publisher of this letter. After the libel had been proved, and the defendant's counsel heard, Lord Ellenborough, in his address to the jury, observed, "the law of England is a law of liberty; and, consistently with this liberty, we have no imprimatur, there is no such preliminary license necessary. But if a man publish a paper he is exposed to penal consequences, as he is in doing every other act, if it tend to the prejudice of any individual. It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime whether wrapt in one form or another. The case of the *King* v. *Tutchin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and although at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the court by any application for a new trial." Again, his lordship says, "No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types and figures, the act by the law of England is a libel." And again, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the govern-

Next, as to publications against the administration of justice.

Contempts against the King's Judges, and scandalous reflections on their proceedings, fall within the same consideration with the last mentioned class of offences, since nothing tends more to disturb public order than to infuse suspicions concerning the administration of justice.

Offences of this nature may consist either in the more gross violation of decency, by making use of contumelious and insolent language in the face of the court, or in the publishing of reflections on the purity of its proceedings, tending to obstruct the course of justice.

Generally, any contemptuous or contumelious

ment. But gentlemen, we must confine ourselves within limits. If, in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." The defendant was found guilty, but not called up for judgment, having redeemed himself by giving up the author of the libel, who was immediately prosecuted and convicted. E. T. K. B. 1804. The *King* v. *Johnson*, 7 East. 65.

Other cases may be referred to, in which the same doctrine has been repeated in the judgments of the court upon defendants convicted of public libels. In the case of *The King* v. *Cobbett*, K. B. 1810, for a libel, tending to excite disaffection in the army, and the cases of *The King* v. *Fisher*, *The King* v. *Lovel*, *The King* v. *Gale Jones*, and *The King* v. *Drakard*, the same general principles were expounded and applied. See also *The King* v. *Burdett*, 4 B. and A. 115, 314.

words, when spoken to the judges of any courts, in the execution of their office, are indictable (*s*), As if one give the lie (*t*) to a judge of a court leet, in the face of the court; or, being admonished by him to pull off his hat, say (*u*), "I do not value what you can do;" or tell him, in the face of the court, that he is forsworn (*x*), or call him a fool (*y*), or say, "If I cannot have justice here, I will have it elsewhere (*z*)."

When reflecting words are spoken of the judges of the superior courts, at Westminster, the speaker is indictable both at common law and under the statutes of Scandalum Magnatum, whether the words relate to their office or not.

With respect to inferior magistrates, such as justices of the peace, it seems to be clear, on the authorities, that abusive and defamatory words spoken of them in their absence, and which do not relate to the execution of their office, are not

(*s*) 1 Sid. 144. Str. 420. 2 Rol. Ab. 78. In *The King* v. *Revell*, 1 Str. 420. it was held that the words "you are a rogue and a liar," spoken to a justice of the peace in the execution of his office, were indictable, and that such words spoken of him in his absence would also have been indictable. See also *R.* v. *Darby*, 3 Mod. 139.

(*t*) Ow. 113. Mo. 470. Cro. Eliz. 581.

(*u*) Ray. 78. 1 Keb. 451, 465.

(*x*) 2 Rol. Ab. 78.

(*y*) Cro. Eliz. 78.

(*z*) 1 Sid. 144. Keb. 508.

indictable (*a*). And even although the words affect them generally in their office, as where they impute want of ability, capacity, or integrity, it seems that they are not indictable. For though the contrary seems to have been held in *Darby's* case (*b*),

(*a*) See the following note.

(*b*) 3 Mod. 139. (S. C. Comb. 65. Carth. 14.) The defendant was indicted for speaking scandalous words of Sir J. Kearle, a Justice of the Peace, viz. "Sir John Kearle is a buffle-headed fellow and doth not understand the law, he is not fit to talk with me; I have baffled him and he hath not done my client justice." And the court is reported to have held that though the words were not actionable, yet that they were indictable for the reason given in the text. In the subsequent case of the *Queen* v. *Langley*, Salk. 697. on an indictment for saying to the Mayor of Salisbury you are a rogue and a rascal; Holt, C. J. held, that the words were not indictable, the mayor not being in the execution of his office nor a patent officer; and that it did not appear that the mayor was a justice of the peace, at least, not by commission from the king; yet that, if the words had been written, an indictment would have lain. Et per totam curiam, words that directly tend to a breach of the peace, as if one man challenge another, are indictable; and the commission of oyer and terminer de propalationibus verborum is to be construed of words against the government or scandalum magnatum, &c.; but for these petit offences which are contra bonos mores, the law has another provision, by requiring surety of the peace and good behaviour, in default whereof the magistrate may commit him, when spoken out of court; and when in court the magistrate may proceed summarily against him and fine him for the contempt.

yet that decision has been materially impeached by other authorities. Indeed the reason there given for

In the report of the same case, 6 Mod. 125, it is stated that after great deliberation they adjudged the words were not indictable, for it is not so much as said, that he was in the execution of his office or a justice of the peace. Indeed had they been put into writing, they would be a libel, punishable either by indictment or action; but they are but loose and unmannerly words, like those spoken of an alderman of Hull, "when he puts on his gown, Satan enters into it," which were adjudged not indictable in Kelynge's time; (1 Mod. 35.) You are a forsworn mayor and have broken your oath, not indictable, (Stiles, 251.) And binding him to his good behaviour is sufficient to secure the authority of mayors; but that must be done instantly according to Dr. Bonham's case, (Stiles, 251.) and Holt, C. J. said, that words which led directly to a breach of the peace may be indictable; otherwise to encourage indictments for words would make them as uncertain as actions for words are.

Again in the case of the *Queen* v. *Wrightson*, Salk. 698. which was an indictment for saying of Sir Rowland Gwyn, a justice of the peace, in discourse, concerning a warrant made by him; "Sir Rowland is a fool, an ass, and a coxcomb, for making such a warrant, and he knows no more than a stickbill;" the court held, on demurrer, that there was a breach of good manners, for which he might be bound to the good behaviour, yet there was no indictable offence. And in this case, many of the former authorities were referred to, viz. 2 Keb. 494. Hutt. 131. 1 Cro. 362. 3 Mod. 139. 1 Vent. 169. and *R.* v. *Selby*, Mich. 4 Ann. K. B. where the defendant was indicted for the words, "He is not fit to be a justice, for if a man is before him he will give it right or wrong where his affection is;" and where it was held that

holding such words to be indictable, that it is an indirect scandal against the government to have

the indictment lay not. Et per Holt, C. J. to say a justice is a fool, or an ass, or a coxcomb, or a bufflehead, is not indictable; quod fuit concess. per Powell, and vid. 2 Rol. Rep. 78. 4 Ins. 181. In the report of the case of the *Queen* v. *Langley*, 2 Ld. Ray, 1029. Gould, J. is reported to have said, that in *Darby's* case, 3 Mod. 139. the court held that the words were not indictable, yet the contrary appears, as well from the report, 3 Mod. 139. as from the reports of the same case, Comb. 65. and Carth. 14.; in the latter of which it is stated that the defendant was fined 100 marks.

In the case of the *King* v. *Penny*, 1 Ld. Ray, 153. (8 and 9 W. 3.) the defendant was indicted for saying of Mr. Martin, a justice of the peace, "I did not care if all the Martins had been hanged five years ago, and the justice is now turned out of the commission;" and the indictment was quashed, on motion, the court observing that Mr. Martin ought to have brought his action.

In the case of the *King* v. *Revell*, Str. 420. where the defendant was indicted for saying *to* a justice of the peace in *the execution of his office*, you are a rogue and a liar, it was held that an indictment lay; and the court, in giving judgment, observed "the true distinction is, that where the words are spoken in the presence of the justice there he may commit; but when it is behind his back the party can be only indicted for a breach of the peace." And the court also held, that where the party might be committed he might also be indicted. But in the subsequent case of the *King* v. *Pocock*, Str. 1157. an information was moved for words spoken by the defendant in a conversation about a warrant which had been granted by Mr. Kent, a justice of the peace, in which the defendant having asked whether Mr. Kent was a sworn jus-

appointed an ignorant man to be a justice of the peace, is too remote to be satisfactory. But the

tice, and having been answered "to be sure he is or else he would not act," replied "if he is a sworn justice, he is a rogue and a forsworn rogue." Et per curiam, there ought to be no information, it is not the same insult and contempt as if spoken to him in the execution of his office which would make it a matter indictable.

In *R.* v. *Weltje*, 2 Camp. C. 142. the defendant was indicted for saying of a justice of the peace, *in his absence*, that he was a scoundrel and a liar. Lord Ellenborough, C. J. said, "the words not having been spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt, in a case in Salkeld, (*R.* v. *Wrightson*, 2 Salk. 698. and in *R.* v. *Pocock*, 2 Str. 1157.) the court of King's Bench refused an information for saying of a justice, in his absence, he was a *forsworn rogue*. However, I will not direct an acquittal on this point, as it is upon the record and may be taken advantage of in arrest of judgment. It will be for the jury now to say, whether the words were spoken of the prosecutor as a justice of the peace and with intent to defame him in that capacity; for if they were not, the indictment is not supported, and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex." And the indictment must aver that the words were spoken to the justice in the execution of his office; *R.* v. *Leafe*, Andr. 226. and see Com. 46. Com. Dig. Ind. D. Carth. 14. *R.* v. *Darby*, Bac. Ab. tit. Information, 637. *R.* v. *Langley*, Holt's R. 654.

See also the *Queen* v. *Nun*, 10 Mod. 186. 11 Mod. 166. 12 Mod. 98, 514. Lord Holt held that, though an insolent witness might be committed by the court for a contempt, he could not be indicted. 7 Mod. 28.

case might fall under a very different consideration if a magistrate were to be charged with some specific act of oppression or corruption in his judicial capacity. And it is clear that general abuse, in such cases, whether the magistrate be absent or present, is a sufficient ground for binding the offender to his good behaviour, or of indictment if the defamation be in writing,

Next, where the publication reflects upon the administration of justice.

Hurry (*c*) had summoned Watson, who was member of a corporate body, into a Court of Requests, to recover the sum of eleven shillings, Hurry was afterwards indicted by Watson for perjury, alleged to have been committed in the Court of Requests, and was acquitted on the merits. Hurry then brought an action against Watson, for a ***malicious*** prosecution, in which he recovered £3000 damages, and the court refused to set aside the verdict. A majority of the corporation afterwards entered a resolution in their books, asserting, "that *Mr. Watson had been actuated by motives of public justice,*" and voted him the sum of £2300.

An information was applied for, one ground for which was, that the terms of the order constituted a high contempt of the administration of

(*c*) *The King* v. *Watson and others,* 2 T. R. 199.

justice. On granting the information, Ashhurst, J. observed, " The assertion that he was actuated by motives of public justice, carries with it an imputation on the public justice of the country; for if these were his only motives then the verdict must be wrong."

And Buller, Justice, " Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made upon courts of justice in this country; they can be of no service, and may be of the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken; when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method which the law allows to correct the mistake; but when a person has recourse to a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself."

An information had been filed by the Attorney-general, against White and others, for an abusive comment on the conduct of a judge and jury, by whom a person had lately been tried for murder and acquitted. Upon the trial of the defendants for the libel, Grose, J. informed the jury, that in

case they were of opinion that the publication had been made, not with a view to elucidate the truth, but to injure the characters of individuals and to bring into contempt the administration of justice in the country, they ought to find the defendants guilty (*d*).

The same policy which prohibits seditious comments on the King's conduct and government, extends to reflections on the proceedings of the two houses of Parliament. These bodies, so essential a part of the constitution, are at all events entitled to reverence and respect on account of the great and important public services which they are bound to discharge. They have exercised, from very early times, the means of repressing immediate insults and contempts of their authority, which are essential at least to their dignity, if not to their very existence; nevertheless, they have been sparing in the exercise of their extensive and apparently undefined powers, and have, in many instances, waived their privileges, and delivered over offenders to be dealt with

(*d*) The Jury found them guilty, and they were sentenced to three years' imprisonment.

See also the case of the *King* v. *Smith*, Skinn. 124. where the charge was that the defendant had instructed Stephen Colledge to say on his trial at Oxford, that "Government might as well have hanged him at Tyburn, as brought him hither to murder him with a little more formality."

by the common law. It seems to have been the policy of the courts to encourage such a proceeding: and it is no less the duty of juries to pay a ready attention when proof of such insults is submitted to them.

In the case (*e*) of *the King* v. *Rayner*, the defendant having been convicted of printing a scandalous libel upon the Houses of Lords and Commons, called "Robin's Reign, or Seven's the Main," the court set a fine of £50 upon him, committed him for two years, and until he should pay the fine, and likewise till he should find security for his good behaviour for seven years.

William Owen (*f*) was tried upon an information exhibited against him for publishing a malicious libel, entitled "The Case of the Honourable Alexander Murray, Esq. in an Appeal to the People of Great Britain," &c. tending to scandalize and vilify the whole body of the Commons in Parliament assembled; to represent the proceedings in Parliament as cruel, arbitrary, and oppressive; to make it believed that the Commons in Parliament assembled had acted, in their legislative capacity, in open violation of the constitution; and also to represent the said House of Commons as a court of inquisition, &c. &c.

(*e*) 2 Barnard. K. B. 293. Dig. L. L. 125.
(*f*) Michs. 25 G. 2. K. B. MSS. Dig. L. L. 67.

Upon the publication of this alleged libel by the defendant, the Commons addressed the King, desiring his majesty to give orders to prosecute the publisher, which was (*g*) done.

After the impeachment of Mr. Hastings, a review of the articles of impeachment was published, by John Stockdale. Upon the suggestion of Mr. Fox, one of the managers of the impeachment, the House unanimously voted an address to the King, praying his majesty to direct his attorney-general (*h*) to file an information against Mr. Stockdale, as the publisher of a libel upon the Commons. The attorney-general, on opening the case to the jury, after stating the address of the Commons, proceeded to observe, "I state it as a measure which they have taken, thinking it, in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purpose of

(*g*) He was tried before Lord C. J. Lee, and acquitted.

(*h*) Sir Archibald Macdonald, afterwards Lord Chief Baron of the Court of Exchequer.

vindicating themselves against insult and contempt, but which, in the present instance, they have wisely forborne to exercise, thinking (*i*) it better to leave the offender to be dealt with by a fair and impartial jury."

In the case of ***Burdett, Bart.*** v. ***Abbot*** (*k*) it was held, on a consideration of all the authorities, that a commitment by the speaker of the House of Commons of the plaintiff, a member of the House, upon a resolution of the House that a printed paper, the printing of which had been authorised by the plaintiff, was a libel on the House, and that an order by the House that he should be committed on the speaker's warrant was legal (*k*).

(*i*) Ridgway's Speeches of the Hon. T. Erskine.

(*k*) 14 East. 1. Trespass against the speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the plaintiff, (the outer door being shut and fastened,) and arresting him there, and taking him to the Tower of London and imprisoning him there; it was held to be a legal justification and bar to plead that a parliament was held which was sitting during the period of the trespasses complained of; that the plaintiff was a member of the House of Commons, that the house having resolved "that a certain letter," &c. (in Cobbett's Weekly Register,) was a libellous and scandalous paper, reflecting on the just rights and privileges of the house, and that the plaintiff (who had admitted that the said letter, &c. was printed by his authority) had been thereby guilty of a breach of the privileges

of that house, had ordered that, for his said offence, he should be committed to the Tower, and that the speaker should issue his warrant; and that accordingly the defendant, as speaker, in execution of the said order, issued his warrant to the serjeant at arms, to whom the execution of such warrant belonged, to arrest the plaintiff and commit him to the custody of the lieutenant of the Tower; and issued another warrant to the lieutenant of the Tower to receive and detain the plaintiff in custody during the pleasure of the House, by virtue of which first warrant the serjeant at arms went to the messuage of the plaintiff where he then was to execute it, and because the outer door was fastened, and he could not enter, after audible notification of his purpose and demand made of admission, he by the assistance of the said soldiers broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody under the other warrant by the lieutenant of the Tower. See also Mr. Holt's Treatise on the Law of Libel, 2nd Edition, p. 132. and the authorities there collected.

Note.—Scandalous reflections upon the grandees of the realm fall within the division of the subject which has been considered in this chapter; but since the proceeding by writ of Scandalum Magnatum is of a civil as well as of a criminal nature, the extent of the injury has been treated of in a previous chapter, vol. I. c. 6.

CHAPTER IX.

Publications exciting to an illegal Act.

LASTLY, the mischievous quality of the communication may consist in its tendency to excite an individual to the commission of some illegal act.

This offence may consist either in a direct solicitation, or in the holding out some indirect but forcible motive to the commission of such an act.

In the cases of high treason and misdemeanors, all advisers are considered as principals, and are identified with them as to all penal consequences. In petit treason (*a*) and felonies, a procurer by solicitation or advice is punishable as an accessory before the fact; and by many statutes creating new offences, counsellors, aiders, and abettors, are subjected to specific punishments.

And where the solicitation is not followed by the actual commission of the offence contemplated, it is perfectly clear that the adviser is liable to

(*a*) 1 Hale's P. C. 615.

be (*b*) punished for his wilful attempt to violate the law, through the agency of another.

And secondly, the holding out any indirect but forcible motive, to induce the commission of an illegal act, is in itself indictable.—Thus, it is not only illegal to send a challenge to fight, but even an attempt to provoke (*c*) another to send such a challenge is a misdemeanor, since the endeavour is an act done towards the accomplishment of the offence (*d*).

With respect to communications tending to acts of personal violence, there is an important distinction between words spoken and written, or printed publications; the former are not indictable, though they be scurrilous, and reflect upon the character of an individual, or even be addressed personally to him, unless they (*e*) amount to a di-

(*b*) *R.* v. *Phillips*, 6 East, 464. *R.* v. *Southerton*, 6 East, 126. *R.* v. *Higgins*, 2 East, 5.

(*c*) By 22 G. 2. c. 23. "If any person, on board the fleet, shall use reproachful or provoking speeches or gestures, tending to make any quarrel or disturbance, he shall, upon being convicted thereof, suffer such punishment as a Court Martial shall impose.

(*d*) 6 East, 464.

(*e*) 6 Mod. 125. Ld. Ray. 1030. The terms *liar* and *rogue* are not indictable when spoken, because (as is said) they do not immediately tend to a breach of the peace, 4 Ins. 181.

Notwithstanding this authority, it would not be easy to select two other words in the language which do so effica-

rect solicitation to a breach of the peace, as by a challenge to fight. The defendant (*f*) said to the mayor of Salisbury, "You, Mr. Mayor, are a rogue and a rascal;" and it was held, after great deliberation, that the words were not indictable, since they were not spoken to him in the execution of his office; that if they had been put into writing they would have constituted a libel, which would have supported either an indictment or an action; but that they were but loose or unmannerly words, like those spoken of an alderman of

ciously tend to a breach of the peace, or which have, in fact, been so frequently the forerunners of blows, as the two alluded to. The reason for tolerating such oral but tempting incitements to violence, seems to be the well-grounded apprehension, that, to subject the speakers of abusive words to punishment, would be to cherish a spirit of petty litigation, the inconvenience of which would outweigh the mischief intended to be remedied. The experiment was made with respect to actions (vol. i. p. 22), but the judges were quickly induced to abandon the rule they had laid down, which does not seem ever to have been extended in the same latitude to the criminal offence; and Lord Holt observed, that to encourage indictments for words would render them as uncertain as actions for words are. Supra. 197.

By st. 9 Ann. c. 14. s. 8. in case any person shall challenge another, or provoke him to fight, on account of money won at play, he shall, upon conviction, forfeit all his goods and chattels and personal estate whatsoever, and shall suffer imprisonment for two years. See Haw. P. C. b. 1. c. 72. s. 42.

(*f*) The *Queen* v. *Langley*, 6 Mod. 125.

Hull—" When he puts on his gown, Satan enters into it," which were adjudged to be not indictable; and Holt, C. J. said, that words directly tending to a breach of the peace, may be indictable; but otherwise, to encourage indictments for words, would make them as uncertain as actions for words are.

But it seems to be perfectly settled, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt, or ridicule(*g*), amounts to a libel in the indictable sense of the word. And since the reason is, that such publications create ill blood, and manifestly tend to a disturbance of

(*g*) 3 Black. Com. 150. Haw. Pl. Cr. c. 73, s. 1. 5 Co. 125. 5 Mod. 165. Salk. 418. Str. 422, 791. 12 Mod. 221. Ld. Ray. 416. 1 Sid. 270. Supra, v. i. c. 5.

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation which, to some men, is more dear than life itself; it has been held, that not only charges of a flagrant nature and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous ignominious light, whether expressed in printing, or writing, or by signs, or pictures, for these equally create ill-blood and provoke the parties to acts of revenge and breaches of the peace. Bac. Ab. tit. Libel, A. 2.

the public peace, the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which a party reflected upon will exert before he is excited and provoked to acts of outrage, and therefore prohibits equally all imputations conveyed by such means, and possessing such a tendency.

The grounds of the distinction between oral and written provocation, are to be sought after in practical wisdom and experience, rather than in principle, inasmuch as the tendency to produce illegal violence is oftentimes stronger in the former case than in the latter: for instance, contumelious and insulting language is more likely to inflame the party to whom it is applied, to acts of outrage, when it is uttered publicly in his hearing, than if even the same expressions were to be conveyed to him by a private letter, when the insult would be divested of its main aggravation,—its publicity,—and the distance of the offended party from the aggressor would allow any irritation which was created an opportunity to subside, without venting itself in an act of violence. It seems that, in general, where a defamatory libel reflecting on the character of an individual will support an action for damages, the publication of it amounts to an indictable offence, inasmuch as it

tends to provoke animosity and violence, and to disturb the peace of society (*h*).

An indictment (*i*) also lies for a libel reflecting upon the memory of a person who is dead, if it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief (*k*) cause of punishing offences of this nature, is their tendency to a breach of the peace; and although the party be dead at the time of publishing the libel, yet (according to Lord Coke) it stirs up others of the same family, blood, or society, to revenge, and to break the peace.

In the case of the *King* v. *Chrichley* (*l*), an information was granted against the defendant, for publishing the following libel, reflecting upon Sir C. Gaunter Nicoll, Lady Dartmouth's father, and on the government: "On Saturday evening died of the small pox, Sir C. G. Nicoll, Knight of the

(*h*) Skinn. 123. 2 Wils. 204. Com. Dig. tit. Libel, c. 3. Bac. Ab. tit. Slander, 202. 3 Bl. Com. 125. 2 Camp. R. 511. and, therefore, as to the extent of the offence, see Vol. 1. c. 5. p. 148. In some instances an indictment lies for words which would not support an action. See Com. Dig. Ind. D. *R.* v. *Darby*, 3 Mod. 139.

(*i*) 5 Co. 125. Haw. Pl. Cr. c. 73. s. 1. The *King* v. *Topham*, 4 T. R. 126.

(*k*) Haw. Pl. Cr. c. 73. s. 3. 5 Co. 125. *R.* v. *Walter*, 2 Esp. C. 51.

(*l*) 4 T. R. 129. in the notes.

most honourable order of the bath, and representative in Parliament of the borough of Peterborough. He could not be called a friend to his country, for he changed his principles for a red ribband, and voted for that pernicious project, the excise." But, as was observed by Lord Kenyon, C. J. in the case of the *King* v. *Topham* (*m*), "To say that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the good, would be to exclude the most useful part of history." The malicious intention of the defendant, therefore, to injure the family and posterity of the deceased, must be expressly averred and clearly proved.

And it is not necessary that the libel should reflect upon the character of any particular individual (*n*), provided it immediately tend to produce tumult and disorder.

(*m*) 4 T. R. 129.

(*n*) 3 Bac. Abr. 494. 2 Barnard, K. B. 138, 166. The *King* v. *Osborne*, D. L. L. 79.

An indictment for a libel on several persons, to the jurors unknown, is bad. *R.* v. *Orme* (or Alme,) *and Nut*, Ld. Ray. 486. 3 Salk. 224.; but a libel upon one of a body of persons without naming him, is a libel upon the whole, and may be so described. The defendant published the following advertisement in a newspaper: "Whereas an East India Director has raised the price of green tea to an extravagant rate, the same gentleman being also concerned with the Swedish

An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad-street, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad-street, had been attacked by multitudes, in various parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more; and it was objected, that no information could be granted, because it did not appear, in particular, who the persons reflected upon were. But by the court, "Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind;

East India Company; the English proprietors hope he will find some measure to raise bohea tea in Sweden, that the Company may have an opportunity to ship off some of their bad bohea tea, instead of having it burnt as usual." Upon motion for an information, Lee, C. J. observed, "Where a paper is published, equally reflecting upon a number of people, it reflects upon all, and readers, according to their different opinions, may apply it so." *R.* v. *Jenour*, 7 Mod. 400. An information has been granted for charging one of several trustees with a breach of trust. *R.* v. *Griffin*, Rep. T. H. 39. See below tit. Information.

such sort of advertisements necessarily tending to raise tumults and disorder among the people, and inflame them with an universal spirit of barbarity, against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible (*o*)."

(*o*) *R.* v. *Osborne*, 2 Kel. 230. pl. 183. 2 Barnard. K. B. 138. 166. and see below tit. Information.

CHAPTER X.

Publications against sound Policy and Convenience.

NEXT, every publication is intrinsically illegal which tends to produce any public inconvenience or calamity. Under this division, those rank highly, in respect of the magnitude of their results, which tend to disturb the amicable relations which subsist between this and other nations, by malicious reflections upon those who are possessed of high rank and influence in foreign states. As the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at common law. Thus, in the case (*a*) of the *King* v. *D'Eon*, an information was filed against the defendant by the attorney-general (*b*), for publishing a libel upon the Count de Guerchy, who was at that time residing in this kingdom, in the capacity of ambassador from the court

(*a*) Easter T. 4 G. 3. 1764. K. B. MSS. Dig. L. L. 88.
(*b*) Sir Fletcher Norton.

of France. The information charged the defendant with an intention to defame the character and abilities of the Count De Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behaviour in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of ambassador. The defendant was convicted.—Lord George Gordon (*c*) was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashhurst, in passing sentence, observed, that unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the state.—The defendant, John Vint (*d*), was found guilty upon an information charging him with having published the following libel, "The Emperor of Russia is rendering himself obnoxious

(*c*) Hil. 28 G. 3. The defendant was sentenced to pay a fine of £500, to be imprisoned in Newgate for the space of two years, and afterwards to give security for his good behaviour for the space of fourteen years.

(*d*) 40 G. 3.

to his subjects, by various acts of tyranny; and ridiculous in the eyes of Europe, by his inconsistency, he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight;" with intent to traduce the Emperor of Russia, and to interrupt and disturb the friendship subsisting between that country and Great Britain.

Jean Peltier was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our Lord the King and his subjects and the said Napoleon Bonaparte and the French republic. The most obnoxious passages of the libel were these: "O! eternal disgrace of France;—Cæsar, on the Banks of the Rubicon, has against him in this quarrel, the Senate, Pompey, and Cato; and in the plains of Pharsalia, if fortune is unequal, if you must yield to the destinies, Rome in this sad reverse at least remains to avenge you a poignard among the last Romans." "As for me, far from envy-

ing his (Bonaparte's) lot, let him name (I consent to it) his worthy successor; carried on his shield, let him be elected Emperor. Finally (and Romulus recals the thing to mind), I wish that on the morrow he may have his apotheosis. Amen!" —Upon the trial, Lord Ellenborough, C. J. referred to the cases of Lord George Gordon and Vint, and said, "I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries."

By the statute 35 H. H. c. 14. (*e*) it is made felony to declare any false prophecy upon occasion of arms, fields, or letters.

By st. 5 Eliz. c. 15. "If any person advisedly and directly advance, publish, or set forth by writing, printing, signing, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, in-

(*e*) See also 3 and 4 Ed. 6. and 7 Ed. 6.

surrection, dissension, loss of life, or other disturbance, within the realm, &c. upon the first conviction he shall suffer one year's imprisonment, and pay a fine of £10, and, for a second offence, shall suffer imprisonment during life, and forfeit all goods and chattels, real and personal. But it is provided, that no one shall be impeached for any offence against the act, unless within six months after the offence committed." (*f*)

It has been from early times considered as an offence at Common Law, to attempt by means of false rumours, to raise the price of provisions, or other necessaries of life.

In 43 Ass. (*g*) it was presented that a Lombard did procure to promote and enhance the price of merchandize, and the Lombard demanded judgment of the presentment for two causes—1. That it did not sound in forestalling;—2. That of his endeavour, or attempt by words, no evil was put in ure, that is, no price was enhanced; but both objections were overruled; "Whereby," says Sir E. Coke (*h*), it appears that the attempt by words

(*f*) By 23 Eliz. c. 2. it was made felony to cast the nativity of the Queen, or to seek to know and set forth how long the Queen shall live, or who shall reign after her decease, or to utter any false prophecies to any such intent, or to wish or desire the death or deprivation of the Queen.

(*g*) P. 38.

(*h*) 3 Ins. 196.

to enhance the price of merchandise, was punishable by law, and did sound in forestalment."

And from (*i*) the same report it appears, that to attempt by such rumours to diminish the price of any staple commodity, to the prejudice of the dealers in general, is likewise an offence at common law; for it is there said, "Knivet reported that certain people came to Coteswold, in Herefordshire, and said, in *deceit* of the people, that there were such wars beyond seas, as no wool could pass or be carried beyond seas, whereby the price of wool was abated; and upon presentment thereof made, they appeared, and upon their confession they were put to fine and ransom."

And in (*k*) Mich. term, 39 and 40 Eliz. it was, after conference and mature deliberation, resolved by all the justices, that every practice or device, by act, conspiracy, words, or news, to enhance the price of provisions, or other merchandize, was punishable by law.

An information (*l*) was filed, charging the defendant, that he, intending to enhance the price of hops, did, at Worcester, in the hearing of divers hop dealers and planters, declare, that the then present stock of hops was nearly exhausted, and would be exhausted before the crop of hops

(*i*) 43 Ass. p. 38.
(*k*) 3 Ins. 196. Bro. Ind. pl. 40.
(*l*) *R.* v. *Waddington*, 1 East. 143.

then growing could be brought into the market, and that there would soon be a scarcity of hops, with intent and design, by such rumours and reports, to induce dealers in hops not to carry any to market for sale. When the defendant (*m*) was brought up to receive judgment, his counsel objected that the counts charging him with having spread rumours to enhance the price of hops, did not aver (*n*) that the rumours were false; and that it should at least have been stated, that the price of the commodity had, in fact, been raised by the rumours. But there were other counts in the information, charging the defendant with engrossing large quantities of hops, with intent to prevent the same from being brought to market, and to resell the same at an exorbitant profit, and thereby greatly to enhance the price of hops; and the defendant was adjudged to pay a fine of £500 and to be imprisoned for one month.

The court does not, in the above case, appear to have given an express opinion upon the indictable quality of the offence described in the first two counts, which consisted in the spreading

(*m*) He was convicted before Mr. J. Le Blanc, at Worcester, and when brought up to receive sentence, the court, out of mere indulgence, allowed his counsel to go fully into the case, saying, that if it appeared that judgment ought to be arrested, or a new trial granted, the defendant should not be precluded from the advantage.

(*n*) See Haw. P. C. c. 80. s. 1.

rumours generally, with intent to enhance the price; nor was this necessnry, since the information contained independent charges which were deemed sufficient, and upon which the judgment appears principally to have been founded. It was contended by the counsel for the prosecution, that "the spreading rumours, whether true or false, if done with a mischievous intent, to produce a public detriment, is indictable upon general principles of law, in the same manner as publishing a libel, however true the facts stated may be; and that, in *Jolliffe*'s case (*o*), the endeavouring to procure certain persons to be appointed overseers, was held to be criminal, though the criminality consisted in the intent only, which was to derive a private advantage." It seems, however, to be clear, that no malice will render an act indictable, which is in itself innocent and legal; the question therefore is, whether the publication of real facts (the knowledge of which may affect the price of provisions or of merchandise) can be considered as detrimental to the community; if it can, then a mischievous intention (that is malice) in the absence of rebutting evidence, is to be presumed; if it cannot, no malice, as it seems, can render it criminal. In many cases, the publication of such facts would rather affect the interests of individuals, than

(*o*) 4 T. R. 285.

those of the community. If, for instance, a person were truly to publish, that the foreign markets were so glutted with a particular commodity, that British wares, of the same description, could not be sold there, the report might operate to the immediate prejudice of the holders of that article; but the prejudice to the public, namely, their exclusion from the foreign market, would be attributable purely to the superfluity which prevailed there, and not to the communication made by the defendant.

It is said to have been resolved by all the judges, that all writers of *false news* (*p*) are indictable and punishable; and, probably, at this day the fabrication of news likely to produce any public detriment would be regarded as criminal and punishable.

In the case of the *King* v. *De Berenger and others* (*q*), it was held to be an indictable offence to conspire to raise the price of the public funds by means of *false rumours*, the end as well as the *means* being illegal.

(*p*) 4 Read. St. L. Dig. L. L. 23.

(*q*) 3 M. & S. 67. the false rumour was that N. Bonaparte the then ruler of France, with whom Great Britain was at war, was dead; and it was laid to have been done with intent to injure and aggrieve all the subjects of the king who should on the 21st day of February, 1814, (the day of spreading the rumour) purchase any share in the public government funds.

CHAPTER XI.

Of the Act of Publication.

THE plaintiff, to entitle himself to damages in a civil action, must, as has been seen, shew a publication made by the defendant, with a wrongful intention; and whatever has been said upon that subject applies equally to the criminal proceeding, with this addition, that the sending of a libel to the individual reflected on, without exposing the contents to a third person, is a sufficient publication to support an indictment, on account of its tendency (*a*), to provoke that individual to commit a breach of the peace.

According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggest illegal matter, in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication, when it has been so effected.

(*a*) 1 Will. Saun. 132. n. 2. 2 Esp. R. 226. 5 Mod. 163. 12 Co. 35. 1 Hob. 62, 215.

But what, if no publication has taken place, is the mere making of a libel, or the possession of it when made by another, a crime by the law of England?

Ld. Coke, in the fifth report De Libellis Famosis, resolution 4, after describing the different species of libels, immediately proceeds to point out the different modes of publication; and then observes, "It was resolved in the Star Chamber, in *Halliwood's* case, that if one find a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a magistrate; but if it concern a magistrate or other public person, the finder ought presently to deliver it to a magistrate." It does not very clearly appear, whether this procedure was prescribed as a strictly legal or merely as a moral duty and matter of prudence, since the phrase, "if he would keep himself out of danger," is abundantly ambiguous. This doubt, however, is in some degree removed by reference to the civil law, whence the doctrine is said to have been derived; according to which it seems, that the finder of a *libellus famosus* was not punishable for the mere keeping of it in possession, but for the improper publication of it.

Si quis famosum libellum sive domi sive in publico vel in quocunque loco ignarus offenderit, aut discerpat priusquam alter inveniat, aut nulli con-

fiteatur inventum; nam quicunque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodiderit auctorem; nec evasurum pœnas hujusmodi criminibus constitutas, si proditus fuerit cuiquam retulisse quod legerit (*b*).

By the edicts of the Emperors Valentinian and Valens:

"Si quis famosum libellum ignarus repererit (*c*), aut corrumpat priusquam alter inveniat, aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit, sed earum vim manifestaverit, sciat se quod auctorem hujusmodi delicti capitali sententiæ subjugandum." Again in the Codex Justinianus de famosis libellis, "Famosis libellis si quis scripserit quod pertineat ad injuriam alterius (*d*), de quâ est publica accusatio et pœna capitalis, non tantum in auctorem famosi libelli, sed etiam in eum qui invenit nec combussit *sed evulgavit;* quia iste auctor præsumitur esse libelli, qui eum *sparsit in vulgus* non prodito auctore."

Hence it may be collected, that the finder of a libel was not punishable for the mere keeping of it in custody, but for its subsequent publication; and therefore it seems that the passage in the re-

(*b*) Theod. Cod. Lib. 9. tit. 34..
(*c*) Cod. lib. 9. tit. 36.
(*d*) Ib. tit. 36.

solution cited, was intended rather as a caution against the effects of a publication, which a party risked by keeping the libel in possession, than a declaration that the keeping of it in possession was in itself a temporal crime.

With respect to the Star-chamber practice, that Court does not appear to have ever punished for the mere possession of a libel; on the contrary, as will afterwards be noticed, their jurisdiction was considered to be doubtful, even where there had been a publication by sending a libel to the party defamed,—a doubt which never could have been entertained, had the power of that Court to punish for mere possession been considered as clearly established. But this offence, if it ever existed as such against the law of the country, probably did not survive the Court which created it.

An information (*e*) was exhibited against the defendant, for causing to be framed, printed, and published, a scandalous libel. Upon evidence it appeared, that two printed libels had been found at the lodgings of the defendant, upon warrants from the principal Secretary of State to search there. The opinion of the Court was, that this was no crime within the information, though he

(*e*) Vent. 31. E. 21. C. 2. 15 Vin. Ab. 89. pl. 6. Dig. L. L. 19.

gave no account how they came there; and that the having a libel in possession without delivering it to a magistrate, was punishable in the Star-chamber only. In the subsequent case of the *King* v. *Beare,* Lord Holt, C. J. is reported to have said, that the collecting and transcribing of libels (*f*), for the purpose of publishing them, is criminal, though no publication should ever take place; since men ought not to be allowed to have such evil instruments in their keeping. But in another report of the same case, the defendant having been found guilty of *writing and collecting* certain libels, it was said, that the *collecting* had been better out of the case (*g*); and it is clear that judgment was given on the ground that the defendant wrote the original libel, since though Lord Holt intimated that the bare copying of a libel was criminal, he said there was no necessity for the opinion, because the defendant had been found guilty of writing the original (*h*).

Upon the different reports of this case, Lord Camden remarked: "If all this be law, and I have no right at present to deny it, whenever a favourite libel is published, the whole kingdom in a month or two becomes criminal, and it would

(*f*) Carth. 409. Holt R. 422.
(*g*) Salk. 417. Ld. Ray. 414.
(*h*) 2 Salk. 419.

be difficult to find one innocent jury amongst so many millions of offenders (*i*)."

With respect to the bare fact of committing libellous matter to print or writing, the nature of the act appears to be much more doubtful; since, though it has been expressly decided that the bare act of writing, without publication, is criminal at common law, the grounds of that determination afford room for doubt.

Under the jurisdiction of the Court of Star-chamber, some publication appears to have been held essential to the completion of the offence; since, even in cases where libels had been sent to the individuals libelled, it was doubted whether the Court had jurisdiction,—a question which never could have been raised, had the mere act of writing been sufficient to complete the offence.

Thus, in the case (*k*) of *Dr. Edwards and Dr. Wooton*, the letter had been written to Dr. Edwards himself, and it was said, that the latter should be punished, (although it was solely writ to the plaintiff without any other publication,) in

(*i*) 11 St. Tr. 322. The case of the *King* v. *Rosenstein*. 2 C. & P. Ni. Pri. Ca. 414. Park, J. thought it highly doubtful whether the having in possession an obscene libel with intent to publish it was an indictable offence.

(*k*) 12 Co. 35. 5 J. 1.

the Star-chamber, for that it was an offence to the King, and a great motive to revenge. And the same question occurred in the case of *Barrow* v. *Llewellin* (*l*), where the letter had been sent sealed to the party, as also in the case of *Sir Baptist Hicks* (*m*); and no instance appears, in which the Star Chamber punished for a libel without some publication.

In the case of *Lewis Pickering* (*n*), in the Star-chamber, the defendant confessed the *publishing* as well as the composing of the libel; and in the resolutions which are subjoined to the case, no hint is given that the mere making of a libel without a publication would be punishable in that court; on the contrary, the reasons for punishing the offence of libelling are expounded, and are as such as can apply to those cases only in which a libel has been actually published: and in the 4th resolution, after the explanation given of the different kinds of libels, the various modes of publication are immediately specified.

In *Lamb*'s case (*o*) the bill was exhibited against the defendants for the *publication* of two libels; and it was resolved, that "every one who

(*l*) 1 Hob. 62. 13 J. 1.
(*m*) Hob. 215.
(*n*) 5 Co. 125. 3 J. 1.
(*o*) 9 Rep. 59. 8 J. 1.

shall be convicted in the said case, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel;" the resolution then goes on to expound, what shall amount to a publication, and afterwards repeats, that every one who shall be convicted, ought to be the contriver, procurer, or publisher of it, knowing it to be a libel. Upon the face of this resolution it appears to be doubtful, whether the contriver and procurer were considered as severally punishable for their acts, though no publication should take place; or whether the resolution does not suppose, in the first place, that the offence has been completed by a publication, and then proceeds to define what degree of agency shall render any party concerned responsible for the whole effect produced. In favour of the former construction it appears, that the actors are separately and disjunctively enumerated as liable to be convicted; and this interpretation was adopted by Lord Holt. In support of the latter construction, it may be observed, that the words, "every one who shall be convicted in the said case," refer immediately to the case of the defendants, who were prosecuted for *publishing* two libels; that in the subsequent part of the resolution it is said, "If the defendant write a copy of a libel, and do not publish it to others, it is no publication;" which affords some

reason for inferring, that a publication was deemed to be in all cases necessary before any conviction could take place; since the passage, if understood in this sense, that a person who commits a libel to writing is not punishable, unless he afterwards publish it, is sensible and intelligible; but if, on the other hand, the construction be this, that a person who writes a libel, but does not publish it, is not punishable as the publisher, but is nevertheless liable as the contriver, as was contended for in the case *King* v. *Beare*,—then the passage is a piece of idle tautology, and amounts to no more than this, that a person, who does not publish a libel which he has written, is not guilty of a publication. The resolution afterwards proceeds to say, "but it is great evidence that he published it, when he, knowing it to be a libel, writeth a copy of it." Upon which it may be observed, that the resorting to presumptive evidence, by making the act of writing proof of publication, would be nugatory, if that act of itself constituted a distinct and substantive offence.

Samuel Paine, a minister, was tried upon an information (*p*), setting forth that he was the composer, author, and publisher of a malicious libel against the late Queen Mary, stiled "Her Epi-

(*p*) 5 Mod. 163. 1 Salk. 281. Comb. 358. Carth. 405. 1 Ld. Ray. 729. Holt. 294.

taph." The jury found, by way of special verdict, that a certain person, to them unknown, did pronounce, dictate, and repeat the words contained in the libel which the defendant did write; and if that will make him guilty of the composing and making of the libel, then they find him guilty, and as to the publication, they find him not guilty. After argument the Court observed, "the making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it; to what purpose should any one *write* or *copy* after another, but to shew his approbation of the contents of a libel, and the better to enable him to keep it in his memory, and repeat the contents of it to others." The matter was, however, adjourned, and it does not appear that any judgment was given.

The defendant *Beare* (*q*) was found guilty of *writing* and *collecting*, but acquitted of the making and composing of several libels stated in the indictment. Upon motion in arrest of judgment, Holt, C. J. said, " Before I come to the objections against the verdict, I shall consider whether it be not criminal to *write* a libel, although a man be not the composer or contriver

(*q*) Ld. Ray. 417. Carth. 409. 12 Mod. 219. 2 Salk. 417.

thereof." The learned judge observed, that it is the putting of the words into writing, which is the essence of the offence; for the party is not guilty unless he put the words into writing; and that in all cases where a man does an act, which act causes the thing to be what it is, such an one is to be considered the doer of it; that in all lower offences procurers are principals, so that if A. hold B. whilst C. beats him, A. is guilty of the battery; that *Lamb's* case was to be expounded by the same case in Moor (*r*), in which it was reported to have been resolved, that the writer of a libel is, in law, the contriver; but that in *Lamb's* case the question was not concerning the writing or making, but about the publication thereof, and it was held, that the writing of a copy of a libel, as indeed the writing of the original libel itself, is no publication thereof, but only an evidence of publication; that the question was not how far the writing of a libel was criminal, but whether the writing of a copy be a publication, which indeed it is not; that the case of *John De Northampton* is apposite, who was charged with writing only, without any mention made of publication, and who confessed the writing only. The learned Judge also expressed his opinion, that the copying of a libel was a li-

(*r*) 813.

bel, because it comprehends all that is necessary to make it a libel, the same scandalous matter, and the same mischievous consequences; since it is by this means perpetuated, and may come to the hands of other men, and be published after the death of the copier; and that if men might take copies of them with impunity, then the printing of them would be no offence, and then farewell to government.

Turton and Rokeby, Justices, were of the same opinion, and referred to several cases (*s*), to prove that writing a libel without publishing it, was punishable in the Star-chamber.

The parallel drawn by Lord Holt, in the above case, seems to be objectionable, since it assumes the offence to have been completed. If A. hold B. whilst C. beats him, A. is guilty of the beating, but the offence, that is, the battery, here is completed; to suppose then, that the case in question is analogous to it, is to assume that the offence of libelling is complete without a publication; the question was not whether an aider or abettor to an offence actually committed was punishable as a principal, but whether any offence had in fact been consummated, or the whole rested in mere intent and preparation, as if A. had sup-

(*s*) Hob. 62. 215. 12 Co. 35.

plied C. with a stick for the purpose of beating B., but no battery had actually taken place.

Neither do the cases relied upon appear to be applicable: in that of John De Northampton (*t*) it is stated, that the letter *was written to* John Ferrers, one of the King's counsel; and the confession runs thus: "*Et quia prædictus Johannes cognoscit dictam literam per se scriptam Roberto de Ferrers, &c.;*" now if "written to" merely imported the address of the letter, which never passed from the defendant, there was no occasion to confess the writing of it to Robert de Ferrers, and the very same terms "written to" are used by Sir E. Coke, in his 12th Report, to imply a sending as well as writing.

The cases cited by Turton and Rokeby (*u*), Justices, are inapplicable; since in those instances there was *a publication* of the libel to the party defamed.

Knell (*x*) was tried upon an information charging him with having printed and published a libel, entitled "Mist's weekly Journal." It was proved that the defendant was a printer's servant, and his business was to prepare the type for printing off, which business was called compos-

(*t*) 3 Ins. 174.
(*u*) Hob. 62. 215. 12 Co. 35.
(*x*) Hil. 3 G. 9. Barnard. K. B. 305. D. L. L. 25.

ing for the press; that the defendant and another composed together the libel in question, taking the alternate columns. For the defendant it was objected, 1. that since the defendant took a distinct part, that which he composed could not bear the construction put upon the whole; and 2dly, that since he composed only, he could not be found guilty of the printing wherewith he was charged. It was answered that, in misdemeanors, an accessory in part is a principal in the whole, and, therefore, as the defendant assisted in the composing, a circumstance essential to the printing, he, by that act, made himself concerned in the whole; that composing was taking a copy in types, which would make the defendant a publisher, since it had often been determined that the taking of a copy of a libel was an act of publication. But the Chief Justice directed the jury to acquit the defendant of the publication, and, if they believed the evidence, to find him guilty of the printing, which they did accordingly (*y*).

(*y*) The defendant was afterwards sentenced to stand upon the pillory twice, and to be kept to hard labour in Bridewell for the space of six months. D. L. L. 124. In *Sir Francis Burdett's* case, Holroyd, J. expressed an opinion that the composing and writing of a libel with the intent afterwards to publish it, amounted to a misdemeanor. In that case there was an actual subsequent publication by the de-

Upon the whole, whatever doubt may exist as to the criminal nature of the act, where it is confined to the mere writing, printing, or preserving of a libel, it seems to be perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is indictable as a principal for the whole mischief produced.

And according to the doctrine laid down in *Lamb's* case (z), where a libel has been published, proof that the defendant committed it to writing, or, by parity of reasoning, did any other act contributing to its existence, is great evidence that he published it, unless he can satisfactorily explain the motive of his act.

fendant, and it was held, by a majority of the Judges, that there was a sufficient publication within the county where the defendant had composed and written the libel.

(z) 9 Co. 59.

CHAPTER XII.

Of the Defendant's Intention, and Collateral Circumstances.

AFTER the observations which have already been so frequently made on the subject of *intention*, little remains to be said.

In point as well of principle as of precedent, *malice* is essential to the offence constituted by any illegal communication (*a*).

This, however, considered as an universal rule, must be understood of malice in its legal and technical sense, as denoting in cases where the act itself is injurious and unlawful, the absence of legal excuse; for in the failure of circumstances which justify, excuse, or at least modify the act, a rational being must, in law as well as morals, be taken to contemplate and intend the immediate and natural consequences of his act.

(*a*) See Haw. Pl. C. c. 73. s. 1. 5 Co. 125. 5 Mod. 166. Salk. 418. 4 Bl. Comm. 125. 150. As malice is necessary in order to constitute civil responsibility, supra, vol. 1, p. 209, 210, á fortiori it is essential to make a party criminally amenable.

Where a party is instrumental to a publication of that which is noxious and illegal, without any moral blame imputable to himself, he cannot be criminally, even although he may be civilly responsible.

A lunatic, or madman, incapable of distinguishing between right and wrong, is not a fit object of penal visitation; neither is a party punishable who publishes a libel without knowledge of its contents, provided his ignorance were not in itself culpable: as where a servant delivers a sealed letter without knowledge of its libellous quality, in obedience to the command of his master, and without any reason for supposing the order to be illegal.

But where the act is knowingly and intentionally done, it is plain that the mere absence of an actual intention to injure cannot absolve from criminal responsibility, when circumstances are wanting which the law recognises as supplying an absolute or modified justification. Where an act is voluntary, injurious in its tendency, and illegal in its quality, it would be contrary to all legal principle and analogy to allow the offender to justify or excuse himself, either on the ground that he mistook the law, or that he offended against the law with such good motives as ought to excuse him. To allow the plea of mistake would be to confer a premium upon ignorance,

and afford an excuse for every possible enormity; to allow every man to set up his own crude opinions against the wisdom of the law, would be at once to overthrow the law as an universal rule of conduct; there is no law when obedience is merely optional.

The same principles apply, where a man negligently and heedlessly does an injurious and mischievous act, without using proper caution: gross inattention to the interests of others is morally as well as legally speaking, sufficient to render the offending party amenable for the consequences (*b*).

(*b*) It is unnecessary to cite authorities to show that, in numerous instances of criminal responsibility, an actual intention to injure is not material, and that the wilful doing of a noxious act, or the wilful omission of a legal obligation, is sufficient to constitute criminal responsibility.

There is, it is true, a distinction between civil and criminal responsibility in respect of the agents understanding and knowledge of consequences; one who was so defective, in point of understanding, as to be unable to distinguish between right and wrong, would not be criminally though he would be civilly responsible for the consequences of his act.

And where one who can distinguish right from wrong, does an act which in itself is unlawful, but does it through mistake or ignorance, but without any blame even of negligence or carelessness, he is not criminally responsible; as where a man has had poison delivered to him when he asked for wholesome medicine, and, supposing it to be the latter, administers

In the case of the *King* v. *Harvey* (*c*), which was one of an information against the defendant for falsely and maliciously publishing a libel asserting that the King was afflicted with mental derangement, the jury, having inquired from the Court whether, in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind, the Chief Justice answered, that a person who publishes that which is calumnious, concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of prov-

it to another. But it is ignorance of the act and its consequences which absolves from guilt; and even ignorance of the nature of the act and its probable consequences will not absolve, except in the absence of all carelessness, negligence, and inattention. If a chemist or apothecary were even by mistake, yet in consequence of negligence and inattention, to administer poison instead of medicine, he would be criminally liable for the consequences.

And ignorance to excuse from penal censure must be ignorance *in fact* and not ignorance *of law*. Thus, though a person who without any negligence administered poison instead of medicine would be excusable for want of knowledge of the fact, yet if he were voluntarily to destroy one who was excommunicated or outlawed, he would be guilty of murder, although he ignorantly supposed that he was bound to kill him when he met him.

(*c*) *R.* v. *Harvey*, 2 B. & C. 257.

ing the contrary lies upon him. And in the case of the *King* v. *Sir Francis Burdett* (*e*), where the publication alleged that divers liege subjects of the king had been inhumanly cut down, maimed, and killed, by certain troops of the king, the learned judge, in summing up, informed the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances, and that if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act is likely to produce.

The question therefore arises, what circumstances does the law regard as affording either an absolute justification, independently of the actual intention of the publisher, or a qualified or modified justification dependent on the absence or existence of malice in fact.

What circumstances then afford an absolute justification independently of intention?

The same principles of policy and convenience which have been already observed upon in reference to justifications in civil actions, apply also, for the most part, (but with one striking exception,) to criminal prosecutions.

Whenever it happens that the law, for the sake

(*e*) *R.* v. *Burdett*, 4 B. & A. 95.

of excluding some greater degree of inconvenience, deprives individuals of their remedy by action, without regard to the mischief occasioned, or the malice of the author, the same reasons ordinarily exclude a criminal prosecution, which would usually produce the same kind of inconvenience even to a greater extent. Hence it is that no one is criminally responsible in respect of any publication duly made in the ordinary course of any parliamentary or judicial proceeding. Thus, as has already been observed, in reference to the civil remedy, no member of either House is responsible in a court of justice for any thing said in that House, and in such cases, to use the words of Lord Kenyon (*f*), courts of law possess no jurisdiction.

The immunity, which the law for wise considerations thus extends to publications made in the ordinary course of parliamentary or judicial proceedings, is confined to such as are warranted by the occasion. If a member of either House of Parliament publish his speech beyond the walls of the House, he can claim no privilege, but stands precisely in the same situation with any other person (*g*).

(*f*) *R.* v. *Ld. Abingdon*, 1 Esp. C. 226. supra, vol. 1. p. 239.; see also the *King* v. *Wright*, 8 T. R. 293. supra, vol. 1. p. 257.

(*g*) *R.* v. *Ld. Abingdon*, 1 Esp. C. 226. *R.* v. *Creevey*, 1 M. & S. 273.

In the case of the *King* v. *Creevey* (*h*) it was held that a member of the House of Commons was liable to be convicted on an indictment for a libel on the character of an individual, although the publication was a correct report of a speech made by the defendant in the House of Commons, and had been published by him in consequence of an incorrect report having been published in other newspapers.

So it is also clear that if any party to a judicial proceeding were to be guilty of any publication of defamatory matter, which was extrajudicial and not warranted by the ordinary course of proceeding, he could derive no justification or excuse from the occasion.

In the case of the *King* v. *Salisbury* (*i*) it was held that it was indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

As one who faithfully reports judicial proceedings is not civilly, so neither is he criminally responsible; the same reason which excludes an action in the one case, repels a prosecution in the other; although the characters of individuals may casually suffer from the publicity of such

(*h*) 1 M. & S. 273.

(*i*) 1 Ld. Ray. 341. vide supra, vol. 1, p. 254, 326.

proceedings, a superior degree of benefit arises to the public at large.

It is a matter of public policy, not only that the mode of administering justice should be known to all, but also that the condemnation of offenders against the law should be publicly announced; for the conviction of any member of society of a crime, in many respects operates in rem, it affects the state and situation of the individual as a member of society, and therefore the public have an interest in knowing the fact. It has even been held, that every one was bound to take notice of an attainder in the county where he lived (*k*). It seems that to publish even by writing or print, according to the truth, that a party has been convicted of a crime, is a good justification to a criminal charge, as well as in a civil action.

It has already been seen (*l*) that the principle on which this important privilege is founded is limited both in respect of the *subject matter* reported, and of the *manner* in which it is reported. As the authorities on this subject have already

(*k*) 3 P. W. 494. Staunf. 96. 8. c. 4. f. 3. and, therefore, it has been said that, on an indictment against one as an accessory after the fact in harbouring a felon, an attainder of the principal, within the county, was proof of the previous knowledge of the attainder.

(*l*) Vol. 1. p. 263.

been noticed, it is unnecessary again to cite them.

And next it has been seen that it is, under some modifications, a good defence to an action to shew that the defendant, at the time of the publication, gave such a description of the author of the slander, and the words he used, as would enable the plaintiff to recover against him. And it seems that, according to the ancient law, the surrendering the author was sufficient to exempt a party who republished the slander from punishment. It appears, from the statutes of Scandalum Magnatum, that no punishment was to be inflicted in case the defendant gave up the author of the false tale, and that the imprisonment, even after conviction, was to cease upon the offender's discovering the first mover of the slander (*m*).

It does not, however, appear that such a defence to an indictment at common law has ever been allowed; nor could it in principle be admitted (*n*), since the law regards not the truth or falsity of the libel, but only its tendency to provoke and injure; and, therefore, where the matter is noxious and injurious, and immediately tends to a

(*m*) Vol. 1. p. 176.

(*n*) If a highwayman shall at the gallows arraign the justice of the law and of those who condemned him, he who publishes shall not go unpunished. 4 Read. St. Law, 154. Dig. L. L. 32.

breach of the peace, the publisher cannot be allowed to protect himself by the plea that he was not the author of the scandalous matter, but, on the contrary, that at the time of publication he truly declared who the author was. But it is to be observed, that the making such a disclosure, at the time of publication, may be material as evidence to rebut the inference of malice, which would otherwise arise from the contents of the libel itself: as, for instance, if a party to whom a libel was published, shewed it to the person reflected on, with a *bonâ fide* intention of giving him an opportunity for making an explanation which the other was entitled to demand, or with a friendly intention to enable him to exculpate himself or seek his legal remedy.

And even a subsequent disclosure is usually regarded as a circumstance to be considered in mitigation, where the fact of publication cannot be justified. It is usually more material to the party aggrieved to identify the anonymous and secret assailant of his reputation, whether it be for the purpose of civil redress or future safety, than to punish the mere instrument of his malice; and such a reparation, though it be tardy, is frequently the only one in the power of the offending party.

It is now to be observed that there is one great

distinction (which has already been alluded to,) between justifications in civil and criminal proceedings; in the latter the truth is not, as in the former, a ground of justification. It has already been seen that the truth is a justification in a civil action, not solely on grounds of extrinsic and collateral policy, but also because the very foundation fails on which the claim to damages might otherwise be erected, that foundation being the *falsity* of the defamatory charge (*o*). On the other hand, the *tendency* of the defamation to produce a breach of the peace, is of the essence of the offence, as far as the public are concerned; and, therefore, the truth or falsity of the publication is collateral to the offence—the imputation, it is obvious, may be not the less provoking because it is true.

As it is essential to prohibit all direct incitements and provocations to break the peace of society, by acts of violence and outrage, so also is it necessary to provide against indirect provocations, which are not distinguishable from more direct attempts either in point of motive or of mischievous results.

If a party were to send a letter to another, directly soliciting him to commit a breach of the peace, no one could doubt the criminality of the

(*o*) See the preliminary discourse, and supra. vol. 1. p. 229.

act. Were the writer to go further and specify some wicked or dishonourable act, as the ground of challenge, or to use expressions of contempt or abuse calculated to excite irritation, and to occasion the party addressed to comply with the request, it would readily be admitted that the state of the case would not be altered for the better, and even though the writer omitted the direct request, but used expressions just as likely to produce the same result, it would be difficult to contend that the case was altered, either in point of intention or of probable consequences.

At all events, therefore, the law is not inconsistent in admitting such a justification in answer to a claim for compensation in damages, at the suit of a guilty party, and in rejecting the same justification on a prosecution for the benefit and security of the public at large.

Some remarks on the policy of admitting such a justification on a criminal charge have been made in another place (*p*).

Whatever may have been the ancient rule of law upon the subject, on this occasion it may be sufficient to state what the law of England at present is on this point; it has now long been settled, that the truth of a libel on an individual is no

(*p*) See Preliminary discourse.

defence to a criminal information or indictment (*q*).

The law to this effect being clearly established, it would be superfluous to inquire, in this place, whether, on general principles of policy and convenience, a different rule might not be adopted in order to avoid the mischief of suppressing the wholesome diffusion of truth, and such a knowledge of the habits and characters of individuals as is essential to the interests of society. It may, however, be observed, in the first place, that with-

(*q*) According to the 4th resolution, in the case *De Libellis Famosis*, 5 Co. 125. "It is not material whether the libel be true or whether the party against whom it is made be of good or ill fame, for in a settled state of government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself either by the odious course of libelling or otherwise; he who kills a man with his sword in a fight is a great offender, but he is a greater offender who poisons another; for in the one case he who is openly assaulted may defend himself, and knows his adversary, and may endeavour to prevent it; but poisoning may be done so secretly that none can defend himself against it, for which cause the offence is more dangerous, because the offender cannot easily be known."

The only authority cited by Lord Coke is that of *Lake* v. *Hatton*, Hobart, 252. where it was ruled by Hobart, L. C. J. in the Star-chamber, that a libel cannot be justified though the contents be true.

In an anonymous case, 11 Mod. 99. an action was brought for a libel; Holt, C. J. said, a man may justify in an action

out going the length of sanctioning the publication of truth, regardless either of motive, occasion, or consequences, great latitude is allowed in consideration of the convenience of society, and that such communications seem to be privileged whenever they are fairly warranted by any reasonable occasion or exigency; that the penal restraint against publishing the truth does not extend to the creating any civil liability, nor, in general, to oral communications, unless they amount to the most direct and personal provocations to break the peace. Finally, it may be remarked that the admitting truth to be a justification against a criminal charge, would be attended with one difficulty and mischief so great, as, without material alterations in our criminal proce-

on the case for words or for a libel, otherwise in an indictment.

In the *King* v. *Bickerton*, Str. 498. upon a motion for a criminal information, the chief justice declared that though truth be no *justification for a libel, as it is for defamatory words*, yet it will be sufficient cause to prevent the extraordinary interposition of the court.

Lord Coke gravely asserts that there are certain marks by which a libeller may be known, "quia tria sequuntur defamatorem famosum; 1. *Pravitatis incrementum*, increase of lewdness; 2. *Bursæ decrementum*, decrease of money and beggary; 3. *Conscientiæ detrimentum*, shipwreck of conscience."

dure, to be in effect insuperable. As any one may commence a prosecution for a libel on any other party, if a justification of the truth were admissible, the character of an individual might be made the subject of investigation without his authority, even without his knowledge, and without his having any opportunity to defend himself; thus it would be in the power of any two malicious men most effectually to injure and calumniate any other individual under the pretext of a judicial inquiry.

These reasons, which have been urged as the ground of rejecting evidence of the truth of a libellous charge as a complete defence to an indictment or information, apply to cases where the prosecutor is guilty of the criminal or immoral act imputed: in other instances, the same principles apply with a still superior force, strengthened by circumstances peculiar to themselves.

Thus, where the libel consists in the holding up an individual to ridicule, by exposing some personal deformity, in a lampoon or print, the truth of the representation would certainly aggravate the ridicule, and would by no means lessen the malice of the author (*r*).

(*r*) Dig. L. L. 16. 3 Bac. Ab. 495. 4 Bac. Ab. 516. *King* v. *Roberts*, cor. Ld. Hardwicke. Puta si alter pœnam delicti sui sustinuerit, aut in vitium naturale objiciatur, claudus ali-

With respect to libels against religion, or morality, the permitting such a defence would be attended with consequences almost too absurd to mention. Suppose a person to publish, that no overruling Providence exists; or that, to break a promise or an oath is a virtuous act—could the discussion of such questions be tolerated in a court, or brought to issue before a jury? or would proof that indecent transactions have actually occurred, supply any excuse for the public exhibition of them in a print or a pamphlet?

Where, however, an indictment is expressly framed upon the statutes of Scandalum Magnatum, it may be doubted whether the truth would not supply a defence, since the words *false* and *lies* are used as descriptive of the offence (*s*).

In the next place, there exists an important and numerous class of cases, in which the law, consulting the general convenience and the exigences of society, extends a qualified protection, dependent on the question whether the party has acted *bonâ fide*, on an occasion recognised by

quis, luscus, aut gibbosus vocetur veritatem convicii non excusare quo minus animo injuriandi, id factum presumatur, contrarii tamen probationem hic admittendam. Vinn. in In. Just. lib. 4.

(*s*) See 12 Rep. 133. 2 Mod. 150.

the law, or has merely used the occasion as a colour and pretext for doing mischief. This most important limitation seems, on principles of public policy already adverted to in discussing the grounds of civil liability, to extend to all publications made in the fair discharge of any public or private, legal or moral duty, of which the ordinary exigences of society, or the party's own private interests, require the performance.

This principle seems to comprehend all publications on subjects of general and public concern in which the author possesses an interest in common with the rest of the community.

Every one, as it seems, has a right to publish that which, in his opinion, will tend to enlighten, instruct, or even amuse mankind; he who attains his object may justly be regarded as a benefactor to society; he who fails is not amenable as a criminal, however erroneous his views may be, unless it plainly appear that his real object was not to improve or benefit mankind, but to produce public mischief and disorder by alienating men's minds from their public or private duties, by base or unworthy means, by destroying their religious faith, corrupting their morals, or instigating them to acts of sedition, tumult, and outrage, or to some other violation of peace.

Upon such principles it is that no man is punishable in respect of the publication of his opi-

nions on subjects in which mankind possess a common interest, be they theological (*t*), moral (*u*), political (*x*), or critical (*y*), provided his communications be sincere and honest and not used as a cloak of maliciousness.

The same essential principle also governs communications affecting the characters of private individuals. No man is punishable as a criminal for a publication made on an occasion which the interests of others, or even his own, fairly required him to make, though its contents may convey an imputation on the character of another, provided such a publication was called for by the exigency of the occasion, and was made *bonâ fide* with a view to the occasion without malice.

Many instances, particularly that of the *King* v. *Bayley* (*z*), have already been cited in illustration of the operation of the same principle on the question of civil liability; it is, therefore, unnecessary to repeat them, for the question of civil and criminal liability, in the case of libels reflecting on individuals, seems in this class of cases to be identical, whenever the publication of such a

(*t*) Supra, c. vi.

(*u*) Supra, c. vii.

(*x*) Supra, c. viii.

(*y*) Supra, vol. 1. p. 305.

(*z*) 3 Bac. Ab. Libel, A. 2. cited by Best, J. 5 B. & A. 647. Supra, vol. 1. 315.

libel is criminal, as concerns the public, it constitutes a civil injury repairable in damages at the suit of the party calumniated (*a*).

It is, however, important to observe, in respect of this class of cases, where the intention of the publisher is the test of civil or of penal liability, that with a view to exemption from criminal as well as civil responsibility, the mere abstract intention of the party cannot protect him, in the absence of facts, which constitute an occasion recognized by the law. The law allows no man to defend himself by saying, "I did an act, in itself injurious, mischievous, and illegal, but I did it with an excellent intention." And it must also be remarked, that a publication not warranted by the nature and exigency of the occasion, cannot be justified in a criminal, any more than in a civil proceeding; for if the occasion does not justify or excuse the act, neither, on the principle just adverted to, can mere abstract good intention supply a sufficient defence.

(*a*) Supra, vol. 1. p. 268.

CHAPTER XIII.

Proceedings against Offenders.

THE proceedings against offenders are either summary, as by their immediate apprehension and imprisonment; by attachment, by binding over to the good behaviour; or, in the more usual mode, by information or indictment. The summary process is in general founded upon contemptuous language and reflections applied to those who preside in courts of justice and their proceedings; and such contempts are either direct, where a judge or magistrate is openly insulted in the execution of his office, or consequential, where the offender, by speaking or writing contemptuously of the court, or its judges in their judicial capacity, reflects upon the authority by which they were appointed, and creates a prejudice against the administration of justice. And first, where the insult is offered in the face of the court by the use of contumelious language, demonstrating the want of that respect and regard which is essential to the preservation of its au-

thority, the offender, it is said, may be instantly apprehended, fined, or imprisoned, at the discretion of the judge, without further examination (*a*).

This doctrine appears to extend to all cases where contemptuous words are spoken in the presence of a magistrate in the actual discharge of his duty. As if a man should say to a justice of the peace in the execution of his office, "You are a rogue (*b*) and a liar," or tell the judge of a Court Leet that he is a fool (*c*), or is forsworn (*d*), or say—"If I cannot have justice here, I will have (*e*) it elsewhere." And though the judge may elect to proceed in this summary mode, yet, if he does not, the offender is liable to an indictment, since, wherever a justice may commit for a contempt, the party may be indicted for the misdemeanor (*f*).

Where the contempt is not offered immediately in the face of the court, but consists in insolent comments upon the court or its proceedings, or in the indecent publication of matters still pending, the effect of which may be to create preju-

(*a*) Cro. Eliz. 78. 2 Roll. Ab. 78. 4 Bl. Comm. 286. Staund. P. C. 73. b.

(*b*) Str. 420. Ow. 113. Mo. 470. Cro. El. 581.

(*c*) Cro. Eliz. 78.

(*d*) 2 Roll. Ab. 78.

(*e*) 1 Sid. 144. 1 Keb. 508.

(*f*) Str. 420.

dice and partiality, and thereby to hinder the fair administration of justice, the proceeding is by attachment, which is a process from a Court of Record, awarded by the justices at their discretion, upon a suggestion, or upon their own knowledge (*g*) or by imposing a fine.

It appears, generally, that an attachment may be granted by any of the superior courts of Westminster Hall against any persons guilty of contempts against them. So a Court of Gaol Delivery may impose a fine, and, as it seems, punish by attachment, for a contempt in prematurely publishing portions of proceedings still pending, in contempt of the prohibition of the Court (*h*).

And a judge, at Nisi Prius, may fine a defendant, on his trial for a misdemeanor, for contemptuous and offensive expressions, applied

(*g*) 2 Haw. 213. vid. Wils. 300.

(*h*) In the case of the *King* v. *Clement*, (4 B. & A. 218.) it was held, that a court of goal delivery had power to prohibit the publication of any part of the proceedings against several persons charged with high treason, until the whole should be brought to a conclusion. And it was held, that a fine imposed by the court on the editor of a newspaper, for a contempt in publishing those proceedings, contrary to such order, was legal, although the fine was imposed in his absence; service of notice to appear, to answer for the contempt, having been served at the office at which the newspaper was published according to the st. 38 G. 3. c. 78. s. 12.

to the judge in the course of making his defence (*i*).

When a party, not present in court, publishes any contemptuous expressions against the court or its proceedings, the court will, upon an affidavit of the fact, make a rule upon him to shew cause why an attachment should not be granted against him; and in some cases, where the offence is of a very flagrant nature, will grant an attachment in the first instance.

(*i*) *R.* v. *Davison*, 4 B. & A. 329. Abbot, C. J. in giving his judgment observed, "If I thought that the decision I am about to pronounce, could have the effect of restraining any person, who may hereafter stand on his trial, from making a bold as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question whether the law of the land shall or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection but for that of the public; and a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion cannot in any other way be prevented, in my opinion, a judge will betray his trust who does not put it in force."

Upon a rule granted (*k*) against the defendant *Wiatt*, to shew cause why an attachment should not issue against him for publishing a libel on the Court of King's Bench, the defendant shewed by affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from one Crownfield, a printer in Cambridge; that it was in Latin, a language which the defendant did not understand; and that he did not know who was the author, otherwise than by a letter which he received from the printer, and which was affixed to the affidavit, by which letter it appeared that Dr. Middleton was the author. On this it was moved that the rule should be discharged; but the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the court. In the next term, Dr. Middleton (*l*) appeared, and confessed that he was the author of the book; the rule was then discharged against the publisher and printer, and the doctor was committed until further consideration. After a few days confinement he was brought into court, fined £50, and bound to his good behaviour for a year.

(*k*) 8 Mod. 123.
(*l*) Fort. R. 201.

A rule (*m*) was granted to shew cause why an attachment should not issue against Elizabeth Mayer and Dowling, for publishing a libel on the proceedings of the court in the trial of Lady Lawley. Elizabeth Mayer produced an affidavit, stating, that her husband kept a pamphlet shop, that in his sbsence Vaughan came to the shop and asked for Lady Lawley's trial, that she did not know that it was in the shop, but searching found it, and refused to sell it to Vaughan, but permitted him to read it. The court said it was beyond all question that attachments had been granted in such cases, and particularly alluded to *Dr. Middleton's* case. The court, in general, agreed to discharge the rule as to her, and said they could not make the rule absolute as to Dowling, because there was no affidavit of service.

A rule having been (*n*) obtained to shew cause why an information should not be granted, the defendant, on being served with the rule, shewed his disregard of it in very contemptuous language. Upon a motion for an attachment, grounded upon this contempt, Northey, attorney-general, insisted that he ought first to be heard to shew cause against it; but the court said, "He shall answer it in custody, for it is to no purpose

(*m*) Mich. 8 G. 2. 1732. 2 Barnard. 43. K. B.
(*n*) 1 Salk. 84.

to serve him with a second rule who has slighted and despised the first; it would be to expose the court to further contempt."

And where the court apprehend that the attachment will be forcibly resisted, they will order the sheriff of the county (*o*) to take with him a force sufficient for its due execution. But it seems that the court will not grant an attachment (*p*) in the first instance, unless the words be sworn to by two witnesses, since otherwise it would be in the power of one hardy man to hinder another of an opportunity of defending himself before he was deprived of his liberty; and when contemptuous words are spoken of the court, the rule for attachment is granted in the first instance; but where they are spoken of its process, a rule to shew cause (*q*) only; and the court will punish for contemptuous words spoken on the delivery of a declaration (*r*) in ejectment.

Where the proprietor of a newspaper was guilty of a contempt, in publishing the proceedings of a Court of Gaol Delivery contrary to the order of the court; the court, on affidavit of the fact, and after an affidavit of notice to the party

(*o*) 1 Str. 185.
(*p*) 1 Str. 185. 3 At. 219. Say. Rep. 114.
(*q*) Tidd. 428. vid. Str. 185. 1068.
(*r*) Str. 567.

to appear before the court to answer the contempt on a day specified and default made, proceeded to impose a fine of £500; and the Court of King's Bench holding the proceeding to be regular, afterwards refused a certiorari to bring up the proceedings into that court (*s*).

When the party has been brought into court, he is either committed, in order to answer interrogatories, or is permitted to enter into a recognizance with two sureties, in such sum as the court shall direct, to appear and make answer upon oath to such interrogatories (*t*) as shall be exhibited against him.

And it is said (*u*), that the party cannot confess the contempt and throw himself upon the mercy of the court, except in cases of rescue and of contempts committed in the face of the court. If the party be discharged upon his recognizance (*x*) to answer interrogatories, and none be exhibited within four days after entering into such recognizance, the court will discharge it upon motion; but if no such motion be made, the court will compel him to answer interrogatories exhibited after the four days. Upon these interrogatories, examinations are taken, and

(*s*) The *King* v. *Clement*, 4 B. & A. 218. supra. 261.
(*t*) Haw. P. C. c. 22. s. 1. Barnard. K. B. 58.
(*u*) 1 Bl. 649. 6. vide 4 Bl. Comm. 284.
(*x*) Haw. P. C. 22. s. 1. 5 T. R. 362.

it is referred to the Master of the Crown Office to make his report; the party (*y*) is then either acquitted or adjudged to be in contempt.

If the party, in his answer, purge himself from the charge upon oath, though he is liable to a prosecution for the perjury (*z*), if he has sworn falsely, he must nevertheless be acquitted of the contempt, and his answer cannot (*a*) be disproved by adverse and contradictory affidavits.

Next, by requiring sureties of the peace, or for the good behaviour of the party.—It seems agreed, that the publication of a libel, does not amount to a breach of the peace, but rests in tendency only.

In Dalton's Justice (*b*), a libel is defined as a thing tending to a breach of the peace; in *Sir Baptist Hicks's* (*c*) case, it is called a provocation to a breach of the peace: and in the *King* (*d*) v. *Summers*, it was held to be cognizable before justices, because it *tended* to a breach of the peace; and in Hawkins's Pleas of the Crown (*e*), and Sir William Blackstone's Commentaries (*f*), a libel in the criminal sense is also defined by its tendency. In the case of the *King* v. *Wilkes*,

(*y*) B. R. H. 23.
(*z*) 6 Mod. 37.
(*a*) 4 Bl. Comm. 288.
(*b*) 289.
(*c*) Hob. 224.
(*d*) Lev. 139.
(*e*) c. 73. s. 3.
(*f*) 4 Bl. C. 150.

the court of Common Pleas (*g*) gave a decided opinion to the same effect. And L. C. J. Pratt observed, "I cannot find that a libeller is bound to find surety of the peace in any book whatever, nor ever was in any case but one, viz.—the case of the seven Bishops, where three Judges said, that surety of the peace was required in the case of libel: Judge Powell, the only honest man of the four judges, dissented; and I am bold to be of his opinion, and to say, that the case is not law. Upon the whole, it is absurd to require surety of the peace in the case of a libeller." And it was held in the above case, that though surety of the peace might be required in the case of libel, it could not exclude the privilege of a member of either House of Parliament, who is intitled to privilege from arrest, in all cases except treason, felony, and actual breach of the peace; and the decision of the court in the proceeding against the seven Bishops, who were committed to the Tower for not entering into recognizances after having published an alleged libel, in their petition to the King, was strongly reprobated. But it has been the practice, from very early times, to require security for the good behaviour from persons publishing contumelious

(*g*) 2 Wils. 150.

and disrespectful words concerning ministers and officers of justice, and their proceedings.

It appears from the 3d Institute (*h*), that in the reign of Edward the 3d, John de Northampton, an attorney of the King's Bench, was committed to the custody of the marshal, for having written a letter reflecting on the conduct of the Justices; and that he afterwards found six mainpernors for his good behaviour.

And it seems that sureties for the good behaviour may be required from any person (*i*) who applies contemptuous or disrespectful language to any Judge, Justice of the Peace, Mayor, or other civil Magistrate, though he be not in the actual execution of his duty (*i*), and though the words have no relation to his office.

And that the rule extends to general words of disparagement spoken of such magistrates in their absence (*k*); but Lord Holt, C. J. intimated, that this ought not to be done by the offended justice, but by one of his brethren (*l*). And the same learned Judge, in the *Queen* v. *Langley* (*m*),

(*h*) 174.

(*i*) Cro. El. 78. Salk. 697. Haw. P. C. c. 61. s. 2. 6 Mod. 124. Holt. 654. Str. 420.

(*k*) Cro. El. 78. 1 Lev. 52. c. 2. s. 3. 11 Mod. 117. Cro. Eliz. 689. contra.

(*l*) 12 Mod. 514.

(*m*) 6 Mod. 124.

after observing that binding to the good behaviour was sufficient to secure the authority of mayors, added, that it must be done instantly, according to *Dr. Bonham's* (*n*) case. It seems, however, from the general current of decisions upon this point, which are very perplexed and contradictory, that the words must either have been spoken in the presence of the magistrate; or if in his absence, have in some way affected him in his office. In other cases it might not be prudent in a magistrate to commit for want of sureties, since he does it at his peril, the case of commitment must be expressed with certainty upon the face of the warrant (*o*); and in case it should prove insufficient, he would be liable to an action for false imprisonment.

But it seems to be perfectly clear, that for unmannerly (*p*) expressions, used in the face of a Court of Justice, though not applied to the Court or its proceedings, or for words spoken for the purpose of deterring an inferior officer, as a constable, from the execution (*q*) of his office, or abusing him whilst discharging his duty, the offender may be bound to his good behaviour.

With regard to mere rash, quarrelsome, uncivil

(*n*) Stiles, 251.
(*o*) Per Walmesly, J., *Dean's* case, Cro. El. 689.
(*p*) 1 Lev. 107. 1 Keb. 558.
(*q*) Haw. P. C. c. 61. s. 2. 3.

words, in general, it seems that sureties cannot be demanded from the speaker, unless they either amount to a direct solicitation to break the peace or scandalize the government, by abusing those who are entrusted by it with the administration of justice; or be uttered with intent to deter an officer from the execution of his duty (*r*). It has been already seen, that for a libel in general, sureties for the peace are not demandable; but where a letter contains a direct challenge, the same security for the good behaviour may be required as if the words had been spoken.

It is said, a recognizance to keep the peace may be forfeited by mere words, but they must directly tend to a breach of the peace, as by a challenge to fight in the party's presence (*s*).

By the stat. 60 G. 3. and 1 Geo. 4. s. 16. it is declared and enacted that any of his Majesty's courts, or any justice of the peace, before whom any person charged with having printed or published any blasphemous or seditious libel, shall be brought for the purpose of giving bail upon such charge, to make it a part of the condition of the recognizance, that the person so charged shall be of good behaviour during the continuance of such recognizance.

(*r*) Haw. P. C. c. 61. s. 3. Cro. Car. 498, 499. Cro. El. 286. Pal. 126.

(*s*) 4 Burn's Jus. 353.

CHAPTER XIV.

Proceeding by Information.

WITH the exception of those cases where a defendant has been guilty of a contempt, no punishment can be inflicted upon him for any malicious publication, unless he shall have been previously convicted of the fact upon the oath of twelve Jurors. There are two modes, by either of which the matter may be subjected to their verdict;—by an information, exhibited in the name of the King, or by the finding of a bill by a Grand Jury.

Note. As to the great antiquity and acknowledged legality of the proceeding by information, see the argument of Sir Bartholomew Shower, 1 Show. Rep. 106. 4 Bl. Comm. 305. whence it appears to have been as ancient as the law itself. To introduce any discussion upon the subject of informations would be inconsistent with the object of this treatise; since, in the first place, informations are, in point of law, no more connected with the subject of libel than they are with any other misdemeanor; and in the second, no doubt can possibly rest upon the legality of a practice which has prevailed for centuries, and been sanctioned by at least two acts of the legislature. 4 and 5 W. and M. c. 18. 43 G. 3. c. 58.

Informations are of two descriptions; they are either filed by the attorney-general as the immediate officer of the crown, or by the master of the Crown Office upon the complaint of a private individual. The objects of those informations which are filed by the attorney-general, are such offences as manifestly tend to excite and produce some great public mischief; but in what cases it may be necessary to call in aid this process is a matter resting in the discretion of that officer, whose duty it is, as the immediate agent of the crown, to bring under the cognizance of the court all offences and abuses which are of so dangerous a nature as to render immediate attention necessary.

In case of libels this power has been exercised where they tend to subvert religion or morality; to excite discontent against the constitution, the King, or his government; to involve the country in foreign wars, or to excite particular classes of people to acts of tumult and outrage; but it has not been usual for the attorney-general to interfere where the libel has affected a private individual only.

With respect to informations granted by the Court of King's Bench.

These were formerly filed at the suggestion of the applicant by the master of the Crown Office, and at the discretion of that officer, without any

direct application to the court; but the practice was put an end to by st. 4 and 5 W. and M. c. 18. which enacts, that the clerk of the crown shall not file any information without an express direction from the Court of King's Bench. It may be proper to adduce a few instances, to show the general principles by which the judges of the Court of King's Bench have been guided in the exercise of this branch of their jurisdiction, and to refer to the regulations which they have thought fit to make.

The court, it seems, will grant a criminal information in respect of any publication which manifestly and directly tends to produce any public mischief or inconvenience.

As, for publishing general reflections on the clergy of a particular diocese (*b*). For offences tending to obstruct or prevent the ordinary course of justice, as by publishing invectives against a judge and jury; by whom a defendant has been found guilty, with a view to bring into suspicion and contempt the administration of justice (*c*). So where a defendant on a criminal information filed against him, published hand-

(*b*) *R.* v. *Williams*, 5 B. and A. 595. Though no particular prosecutor was named, and though the libellous matter was not negatived by affidavit.

(*c*) *R.* v. *White*, 1 Camp. C. 359.

bills in the assize town shortly before the trial was to have taken place, vindicating his own character and reflecting on that of the prosecutor (*d*).

So the court will grant a criminal information for publishing in a newspaper the evidence given before a coroner, accompanied with comments, although the statement be correct, and the party were not influenced by any malicious motive (*e*).

Where a corporation made an order, and entered it on their books, stating, that A. B., against whom a jury had found a verdict, with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed by the Court of Common Pleas, was actuated by motives of public justice, in preferring the indictment; it was held to be a libel, reflecting on the administration of justice, for which an information ought to be granted (*f*).

So an information will be granted where the libel reflects on a body of men, though no individuals in particular be pointed out. As if the libel tend to raise tumults and disorder among the people, by exciting their hatred against a whole class of men.

(*d*) *R.* v. *Jolliffe*, 4 T. R. 285.
(*e*) *R.* v. *Fleet*, 1 B. and A. 379.
(*f*) *R.* v. *Watson*, 2 T. R. 199.

Thus the court granted an information against the defendant for publishing a paper containing an account of a murder lately committed upon a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian, in consequence of which, as appeared on the affidavits, many Jews, in different parts of the city, had been threatened with death, if they appeared abroad, and had been barbarously treated (*g*).

In the case of the *King* v. *Staples* (*h*), an information was granted against the defendant, for having published, in a newspaper called the York Journal, that Richard Thompson, an alderman of York and a justice of the peace, was scandalously guilty of telling a lie in divers companies, viz. that the said Staples had asked Mr. Thompson's pardon for publishing, in the same newspaper, that he, Mr. Thompson, was married

(*g*) *R.* v. *Orme*, 2 Salk. 224, and see 1 Ld. Ray. 486. *R.* v. *Osborne*, Sess. C. 260. 2 Barnard, 138, 166. Kel. 230.

(*h*) And. 228. Dig. L. L. 80. See also Lofft, 462. So an information was granted for these words, in a letter to a mayor. "I am sure you will not be persuaded from doing justice by any little arts of your town-clerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile." *R.* v. *Waite*, 1 Wils. 22.

to one Mrs. W., and, upon granting the information, Page J. observed, that the applying of such words to a magistrate was an aggravation.

The defendant, Staples, published in a newspaper, an affidavit of bastardy, which he stated to have been sworn before Sir W. Billers, a magistrate, by a woman, without its having been read by her; and the court, on granting the information, were of opinion, that the publication of the affidavits was punishable, though no scandalous reflections were made upon the case, especially as they tended highly to defame a magistrate.

The defendant (*i*), in a conversation about a warrant which had been granted by Mr. Kent, a justice of the peace, asked if Mr. Kent was a sworn justice, and being answered that he was, replied, "If he is a sworn justice, he is a rogue and a forsworn rogue;" but the court refused an information, saying, it is not the same insult and contempt as if spoken to him in the execution of his office, which would make it a matter indictable. So where the defendant (*k*) said of a justice of peace, "He is an old rogue for sending his warrant to me," the court refused an information, leaving it to the party to proceed by indictment.

(*i*) *The King* v. *Pocock*, Str. 1157.
(*k*) *R.* v. *Lee*, 12 Mod. 514.

Where the libel imputed to a naval (*l*) commander the want of courage, knowledge, resolution, and veracity; to a peer (*m*), that he acted improperly as a president of a court-martial, and that he had been guilty of perjury, the court granted informations. The defendant (*n*) published, in a newspaper entitled The Gazetteer, the following libel on the Earl of Clanricarde, whose countess, to whom he had been some time married, was then living, "Last night the Right Honourable the Earl of Clanricarde was married, at St. Mary's Church, to Madame Carolina, a celebrated dancer, belonging to the theatre at Smock Alley, and last Saturday they appeared in the boxes at Crow Street Theatre: she had jewels on computed at upwards of £3000." An information was granted. So where the libel (*o*) imputed treasonable designs to a nobleman, an information was granted. And the court will grant informations without regard to the rank (*p*)

(*l*) Trin. 32 G. 2. the *King* v. *Dr. Smollett.*

(*m*) *The King* v. *Philip Thicknesse, Esq.* Hil. 3 G. 3. D. L. L. 86.

(*n*) Tr. T. 1 G. 3. Dig. L. L. 83.

(*o*) Doug. 387. So against the mayor of a town, for sending to a nobleman a license to keep a public house. *Mayor of Northampton's* case, 1 Str. 422. So for representing a bishop as a bankrupt. Hil. T. 1812. Russel, 228.

(*p*) Doug. 387. *R.* v. *Bate.*

or dignity of the parties traduced, whenever their immediate interference appears to be necessary for the purposes of justice (*q*).

An information was exhibited against the defendant Brown, for printing and publishing in a newpaper, called "The Royal Chronicle," a libel (*r*), entitled "An authentic narrative of several particulars relating to the death of Miss Frances Lynes, whose ghost is supposed to have haunted a house in Cock Lane, West Smithfield, for many nights past," tending to traduce and vilify the reputation of one William Kent, and to represent and cause it to be believed, that the said William Kent had, by artful means and circumstances, obtained and procured the last will and testament of the said Frances Lynes, spinster, since deceased, to be made, and unjustly to cause the validity of the said will to be called in question, and also to raise groundless suspicions concerning the death of the said Frances Lynes; and also to cause a false and scandalous report raised and propagated by means of public newspapers, that the spirit or ghost of the said Frances Lynes haunted the house of one Parsons in Cock Lane, to be believed and credited in order to injure and oppress the said William Kent.

(*q*) Bac. Ab. tit. lib. 494.
(*r*) E. T. 2 G. 3. D. L. L. 84.

Mr. Willy Sutton was tried for the murder of Miss Bell, at the Old Bailey, on which occasion his innocence appeared to be so clear, that the jury interfered before the learned judge, who presided, had begun to sum up the evidence. An information was afterwards granted (*s*) against Thomas Holland for writing a libel on Sutton, in a pamphlet, entitled "A most circumstantial account of that unfortunate young lady, Miss Bell, otherwise Sharpe."

It is not necessary, as a foundation for an information, that the libel should charge a criminal act; such an information has been granted, where the object of the libel was to hold the applicant up to ridicule (*t*).

But it seems that, in general, the imputation must be of a personal nature to induce the court to interfere, and that it is not sufficient that it tends to lessen a man (*u*) in his trade.

In the case of the *King* v. *Roberts,* an information was refused against the defendant (*x*) for having published, in a newspaper, that Ward's

(*s*) Dig. L. L. 82. East. T. 1 G. 3. *R.* v. *Holland.*

(*t*) *R.* v. *Benfield,* 2 Burr. 985. As for singing songs in the streets, reflecting on the prosecutor's children, with intent to destroy her domestic happiness. Ib.

(*u*) Andr. 229. 2 Barnard, K. B. 183. Dig. L. L. 90. c. 3. Bac. Ab. 492.

(*x*) Dig. L. L. 90. Bac. Ab. tit. Lib. 492.

pills and drops had done great mischief in twelve different cases, and that they were a compound of poison and antimony.

When a motion (*y*) was made for an information against the defendant for publishing reflections upon the African Company in one of the newspapers, by charging them with having supported their trade by treachery and fraud, the court refused to interfere, considering the matter nothing more than a dispute upon a matter of trade; but the court granted a rule to show cause why an information should not be granted for a libel against the New York Buildings' Company, charging them with raising the value of their stock by getting £100,000 under (*z*) the credit of their seal.

In general where there is reason to suppose, from the circumstances under which the party published, that the act did not proceed from a mere malicious intention, the court will not interfere by granting an information.

The defendant (*a*) advertised, that one Maddox, an apothecary, had personated Dr. Crow, a physician, and taken his fees, and an information

(*y*) The *King* v. *Roberts*. Dig. L. L. 89. 2 G. 2. 1729.

(*z*) 2 Barnard, K. B. 114. *R.* v. *Nutt*, D. L. L. 78.

(*a*) *R.* v. *Bickerton*, Str. 498. *R.* v. *Webster*, 3 T. R. 388. Dougl. 270, 371.

was refused, the apothecary not pretending to deny the charge.

When a man advertised in a public newspaper, that his wife had eloped from him, and cautioned all persons against trusting her, an information for a libel being moved for, it was denied, because it was the only way (*b*) the husband could take to secure himself.

It was advertised, in one of the newspapers (*c*), that Lady Mordington kept an assembly in Moorfields, upon which Lord Mordington advertised, that the person calling herself Lady Mordington was an impostrix, and that there was no such person, except his wife, who always lived with him. Upon motion for an information it was refused by the court, since the term impostrix was properly applied to one assuming the title without any right.

So where the imputation is continued in a petition drawn up for the purpose of obtaining redress for an injury, and not with an intention to asperse the prosecutor, the court will not grant an information, though the publication impute fraud to the prosecutor, since it is no more than is alleged in every bill in chancery.

(*b*) *R.* v. *Enes*, Andr. 229. D. L. L. 89.

(*c*) *R.* v. *Jenneaur*, Easter, 8 G. 2. Bac. Ab. tit. Lib. 492.

The defendant (*d*) complained, in a writing directed to General Wills and the four principal officers of the Guards, in order to be presented to the king, that Captain Carr, after inducing him to part with a warrant for some money due to him from government, under the pretence of procuring payment for him, received the money, and refused to pay it to the defendant. Upon motion for an information, the court held that the petition was no libel.

Miss Mary Jerome (*e*), a Quaker, residing at Nottingham, having acted in disobedience to the rules prescribed by the sect of which she was a member, by frequenting places of public diversion, going into mourning for the death of a relation, and by other transgressions of a similar nature, the society, after many fruitless remonstrances and other useless attempts to reclaim her, proceeded at last in the customary way to pronounce the sentence of expulsion, which, having been approved of at monthly meeting, was afterwards read by the defendant, Francis Hart, as clerk of their meeting. The sentence, after charging Miss Jerome with having imbibed erroneous notions, contrary to Scripture doctrine, and

(*d*) *R.* v. *Bayley*, supra, 257, and vol. 1, 315. Andr. 229. 3 Bac. Ab. tit. Lib. 492.

(*e*) 2 Burn's Ecclesiastical Law, 779. Dig. L. L. 39.

having acted in various parts of her conduct very inconsistently with a life of self-denial, and of having neglected to attend the meetings for divine worship, and reciting the fruitless attempts of the society to reclaim her from error, and to bring her to the acknowledgment of truth, both in judgment and practice, proceeded to declare her no longer in unity with the society. Miss Jerome, being acquainted with this proceeding, sent her maid-servant to the defendant for a copy of the sentence, which he transcribed and inclosed to her under cover; but upon application to the court for an information against the defendant, they refused even a rule to show cause.

Next, as the rules prescribed to those who apply to the court for leave to file criminal informations. In general the applicant must waive his right of action (*f*); and this is an advantage which the defendant derives from this mode of proceeding; for, if convicted under an indictment, the prosecutor would still be at liberty to bring his action to recover damages. Where, however, the court, on hearing the whole matter, are of opinion that it is a proper subject for an

(*f*) *R.* v. *Sparrow*, 2 T. R. 198. The prosecutor may be put to his election before information granted, after that time it is of course to stay proceedings in an action for the same libel. Ib.

action, they will give the party leave to bring (*g*) it.

The court (*h*) will not grant an information, unless the application be made recently after the cause of complaint shall have arisen (*i*).

Where the same libel reflects on several, it is not necessary that all should join in the application, or that the names of all should be specified, since the conviction on one information would be a bar to any other; it being one single offence, though every person injured would severally be entitled to maintain an action (*k*).

The application must be accompanied with affidavits, clearly and specifically stating the circumstances of the case (*l*); these ought not to be entitled, and if they are, cannot be read: those

(*g*) 2 T. R. 198.

(*h*) Bac. Ab. tit. Libel, 492.

(*i*) *Prideaux* v. *Arthur*, Lofft, 393. An application for a criminal information against a magistrate must be made so early in the second term after the offence, as to enable him to shew cause in that term. *R.* v. *Marshall*, 13 East. 332. *R.* v. *Taylor*, Nolan, 204. And it seems that such an application would not be allowed in the 2nd term, where an assize had intervened. *R.* v. *Herries*, 13 East. 270. and see *R.* v. *Bishop*, 5 B. and A. 512.

(*k*) *R.* v. *Griffin*, R. T. Hardw. 39.

(*l*) *Prideaux* v. *Arthur*, Lofft, 393.

produced, on showing cause, may (*m*) or may not be entitled; but all affidavits, after the rule is made absolute, must be entitled.

On a motion for an information against A. an affidavit, in a motion against B., cannot be read, since the person who made it would not be liable to an indictment for perjury, though it should be false (*o*). But in the case of the *King* v. *Joliffe* (*p*), a criminal information having been granted against the defendant, he, before the trial at Nisi prius, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting upon the prosecutor's. This matter being disclosed to the judge at Nisi Prius, was held to be a sufficient ground to put off the trial; and that affidavit having been returned to the court of King's Bench, another information was granted on it against the defendant; the affidavit taken at Nisi Prius being considered as taken under the authority of the court above. The affidavit should set forth the libel (*q*), its application, and the fact of

(*m*) 1 Str. 704. Andr. 313.

(*n*) 6 T. R. 642.

(*o*) 11 Mod. 141.

(*p*) 4 T. R. 285.

(*q*) It is sufficient to set forth a copy of the libel, without annexing the libel itself. *R.* v. *Chappel*, Burr. 402.

publication by the person against whom the information is prayed.

And where the application of the libellous matter is indifferent, the court has refused to grant the information, saying, that they required a seeming and apparent application to be made (*r*). A. stated in his affidavit, that B. had brought him a challenge from C.. and that B. had refused to make affidavit that C. had sent it; but the court held this evidence to be insufficient to warrant them in granting a rule nisi for a criminal information against C (*s*).

It has frequently (*t*) been decided, that it is necessary for the party praying an information to produce an exculpatory affidavit, denying the truth of the charge, since though the truth be no ground of justification on an indictment for a libel, yet it is a sufficient reason why the court should not interfere in an extraordinary way. But though the court, in general, require that the affidavit shall directly (*u*) and pointedly aver the

(*r*) Fitzgibb. 57. pl. 7. D. L. L. 97. Bac. Ab. tit. Lib. 493.

(*s*) *R.* v. *Willet*, 6 T. R. 294.

(*t*) Str. 498. Andr. 229. 3 Bac. Ab. tit. Lib. 492. Barnard K. B. 13. *R.* v. *Miles*, Doug. 184. *R.* v. *Wright*, 2 Chitty, 162. So an information was refused to the first sender of a challenge. *R.* v. *Hankey*, 1 Burr. 316.

(*u*) *R.* v. *Miles*, Doug. 283. It is usual to negative the charge in the words of the charge. *R.* v. *Wright*, 2 Chitty's Rep. 162.

prosecutor's innocence of the charge, the rule admits of some exceptions: as where the party charged is abroad, and then the person making the application in his behalf is expected to go as far in his affidavit as the nature of the case admits of, by swearing to letters or other intelligence within his reach (*x*).

So where the charge is general (*y*), no exculpatory affidavit is required, since it would be absurd to require a man to swear that he was not a traitor or a thief: neither is it necessary where the party is accused of having used criminal language in parliament, since by the express provision of the Bill of Rights, what passes there cannot be questioned elsewhere (*z*).

Where a libel stated that the Duke of Athol was held in such general abhorrence in the Isle of Man, that if he should obtain an act, then depending in parliament, it would occasion (*a*) a revolt, the court held, that no affidavit from the duke was necessary.

Where the libel reflects on a public body of men, an information will be granted, without any exculpatory affidavit, on an affidavit, stating the

(*x*) *R.* v. *Bate*, Doug. 387.
(*y*) *R.* v. *Bate*, Doug. 387. *R.* v. *Haswell*, ib.
(*z*) 1 W. and M. sess. 2. c. 2. art. 9.
(*a*) Doug. 387. in the note.

purchase of the newspaper containing the libel, and that the defendant was the publisher or proprietor of the paper (*b*).

After the rule to show cause has been granted upon the prosecutor's affidavits, it seems that affidavits in confirmation may be produced; but that a supplementary affidavit, if introductory of new matter, is not admissible: but if the new affidavit be partly confirmatory and partly consist of new matter, the court will not wholly reject it, but distinguish between (*c*) what is new and what is confirmatory. Though the affidavits of the prosecutor should be contradicted by those of the defendant, in some circumstances, the court will nevertheless grant the information, if strong probable ground be laid (*d*).

The defendant (*e*) showed for cause against a rule for an information, that the charge of perjury on which the motion was founded was true; but

(*b*) *R.* v. *Williams*, 5 B. and A. 595. for a libel on the clergy of the diocese of Durham. So also in the case of *R.* v. *Jenour*, 13 G. 2.; *R.* v. *Alderton*, 28 G. 2.; *R.* v. *Holloway and Allen*, 15 G. 3. for publishing a libel on the justices of the peace for the county of Middlesex, in a pamphlet called the Wit-Trap, charging them with ignorance and corruption in the execution of their office.

(*c*) The *King* v. *Kinaston*, 2 Kel. 178. Dig. L. L. 55.

(*d*) The *King* v. *Haswell and Bate*, Doug. 372.

(*e*) The *King* v. *Dormer*, Barnard, K. B. 13. Dig. L. L. 77. *R.* v. *Draper*, 3 Smith, 391.

Sir J. Pratt, C. J. said, "In all cases, informations for libels go, unless you can show the court some probable cause for them to believe you did not publish it. Now, if you had denied it, it would have signified nothing; for then affidavit stands against affidavit; therefore, the information shall go, that the fact may be tried." And Fortescue, J. said, "It would be a strange thing, if a man should be allowed to justify when an information is prayed against him, and should not be allowed to justify in the information itself when it is gone."

But in the case of the *King* v. *Bickerton*, the chief justice declared, that, though truth be no justification for a libel, as it is for defamatory words, yet it will be sufficient cause to prevent the extraordinary interposition of the court, and induce them to leave it to the ordinary course of justice before a grand jury (*f*). And with this doctrine the modern practice has conformed.

The prosecutor (*g*) founded his application upon an affidavit, stating, that the defendant confessed to him the publication of the libel; on the other hand it was shown, that the defendant never made any such confession, yet, since the fact of publication was not denied, the information was granted.

(*f*) *R.* v. *Bickerton*, Str. 498.
(*g*) *R.* v. *Sharpe*, Andr. 384.

By a rule E. T. 5 G. 2.—Where a person has obtained a rule nisi for a criminal information, and upon showing cause the rule is discharged, the party who (*h*) made the motion shall pay the costs. But this has been held to be discretionary.

A joint information against several cannot be founded on distinct rules for informations against each (*i*).

When an information is filed by leave of the court, it is provided by st. 4 and 5 W. and M. c. 18. s. 2. that, where the defendant is acquitted, the court shall be authorised to award costs to the defendant, unless the judge shall, at the trial, certify that there was reasonable cause. But it has been held to be compulsory on the court to grant costs to the defendant in case of his acquittal, no certificate having been granted. The certificate must be granted at the trial, and it is afterwards too late to inquire whether there was probable cause for the prosecution (*k*).

The process which has been issued in case of

(*h*) See 2 Kel. 61. pl. 8. Dig. L. 97. Where a complaint for an information against a justice of the peace proved to be frivolous, the attorney, as well as the complainant, was ordered to pay the costs. *R.* v. *Fielding*, 2 Burr. 654. 2 Ld. Kenyon, 386.

(*i*) *R.* v. *Haydon*, 3 Burr. 1270.

(*k*) *R.* v. *Woodfall*, 2 Str. 1131. Dig. L. L. 98.

libel has been either against the person of the offender or his papers.

1. Against the person.

The defendant (*l*), Derby, having been committed upon the warrant of a secretary of state, for publishing a seditious libel, called the Observator, No. 74, was brought before Chief Justice Parker, by habeas corpus, and by him discharged upon entering into a recognizance to appear on the first day of term. Upon that day the defendant took several exceptions to the commitment, and moved to be discharged, insisting, principally, that the commitment previous to indictment, presentment, and conviction for the offence imputed to him, was illegal and contrary to st. 25 E. 3. st. 5. c. 4.; but the court held that he was not entitled to his discharge.

John Wilkes (*m*) was committed upon a secretary of state's warrant for writing a seditious libel, entitled "The North Briton," No. 45. He was afterwards brought up by habeas corpus into the Court of Common Pleas, and being (*n*) pri-

(*l*) *R.* v. *Derby*, Fortescue, 140. Dig. L. 31.

(*m*) 2 Wilson, 159.

(*n*) By the resolutions of both houses of parliament, it has been decided, that privilege does not lie in the case of a seditious libel. Journal of the Lords, Die Martis, 29 Novembris, 1763.

The 3rd resolution of the House of Commons was read—

vileged as a member of the House of Commons, was discharged without bail.

In the above case (o) the court considered the warrant of a secretary of state to be of the same force with that of a justice of the peace, and that neither a secretary nor justice ought to issue a warrant upon his own private knowledge; but that it was unnecessary to state upon the face of the warrant the evidence upon which it was granted, or even to state in the warrant that it was granted upon any charge made. And in the same case it was held, that the words contained in the warrant "for being the author and publisher of a most infamous and seditious libel, en-

"Resolved, by the Commons in Parliament assembled, that privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence;" and it being moved to agree with the Commons in the said resolution, it was, after a long debate, resolved in the affirmative. In the case of *Burdett* v. *Abbott*, 14 East. 1. 5 Dow. 165. 4 Taunt. 401. which was an action against the speaker of the House of Commons for trespass and false imprisonment, it was held that the speaker of the House of Commons might lawfully commit a member of that house, in pursuance of an order of the house to that effect, upon a resolution of the house, that the plaintiff had been guilty of a breach of privilege, in printing a libellous and scandalous paper, reflecting on the just rights and privileges of that house.

(o) See Dig. L. L. 51.

titled 'The North Briton,'" was a sufficient description of the offence, since it was known specifically by that name.

In the case of *Butt* v. *Conant* (*p*), the authority of a justice of the peace to issue his warrant against the publisher of a libel, and to commit, in default of sureties, was much discussed, and, after a consideration of all the previous precedents, it was decided that justices of the peace have such authority, as well in the case of libel as of all other offences, over which, as justices, they have jurisdiction.

In the above case, the libel reflected on the characters of two noblemen, the late Lord Ellenborough, C. J. and Lord Castlereagh. But it seems to be clear that the general doctrine there laid down would apply to all cases of libels, whether they were illegal, as reflecting on the characters of individuals, or for any other mischievous tendency, affecting the public (*q*).

(*p*) 1 B. and B. 548.

(*q*) The publishers and distributors of impious and seditious libels may be immediately taken up and held to bail. It is not necessary to stand by and see the mischief spreading without attempting to interrupt its progress, it would be a reproach to the laws of the country if it were so, and if the magistrates might not arrest the torch in the incendiary's hand, and before it had set fire to the building. Per Leycester, J. in his charge to the jury, Carnarvon Summer Ass. 1819.

In *Leach's* case (*r*) the warrant from the secretary of state was couched in the following terms: "These are, in his Majesty's name, to authorize and require you (the messengers), taking a constable to your assistance, to make a strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled 'The North Briton,' No. 45, and them, or any of them, having found, to apprehend and seize, together with their papers, and bring in safe custody before me, to be examined concerning the premises, and further dealt with according to law." The messengers, under this warrant, seized Mr. Leach and imprisoned him for some time; but on its being found that he was neither author, printer, nor publisher, he was discharged by the Earl of Egremont's order, without even having appeared before him. After a verdict for the plaintiff, the defendants carried the matter, by a bill of exceptions, to the court of King's Bench, when the single point decided was, that the defendants could not justify, inasmuch as they had not acted in obedience to the warrant (*s*).

(*r*) 11 St. Tr. 307.

(*s*) By a resolution of the House of Commons it was declared, that general warrants in the case of libel are illegal. Journ. Comm. 22 Ap. 1766. And such were, by a subsequent resolution, declared to be illegal in all cases. Ib. 25 Ap. 1766.

It is enacted by the 43 G. 3. c. 58. s. 1.—"That whenever any person is charged with any offence for which he may be prosecuted by indictment or information in the King's Bench (not being treason or felony), and the same shall be made to appear to any judge of the same by affidavit or by certificate of the indictment or information being filed against such person in the said court for such offence, such judge may issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other judge of the same court, or before some one justice of the peace, in order to his being bound, with two sureties, as the said warrant shall express, with condition to appear in the said court at the time mentioned in the said warrant, and to answer all and singular indictments or informations for any such offence; and if he shall neglect or refuse to become so bound, such judge or justice may respectively commit him to the common gaol of the county, city, or place, where the offence shall have been committed, or where he shall have been apprehended, there to remain untill he shall become bound as aforesaid, or be discharged by order of the said court, in term time, or by one of the judges of the said court, in vacation; and the recognizance to be thereupon taken shall be returned and filed in the

said court, and shall continue in force until such person shall have been acquitted of such offence, or in case of conviction, shall have received judgment for the same, unless sooner declared by the said court to be discharged." And the same act further provides, "That in case any defendant be committed, either by virtue of such warrant, or by virtue of any writ of capias ad respondendum, for want of bail, a copy of the indictment or information shall be delivered to him or to his gaoler, with notice that unless he shall within eight days enter an appearance, plea, or demurrer, to such indictment or information, an appearance and the plea of not guilty will be entered in his name; and that if such defendant shall neglect for eight days to enter an appearance, and to plead or demur, the prosecutor may, on affidavit of the service of the copy and notice, enter an appearance and the plea of not guilty, and proceed in the usual course: and that, upon acquittal, the judge before whom the trial is had (though not a judge of the King's Bench) may order such defendant to be discharged out of custody as to his aforesaid commitment."

With respect to the seizure of papers, it is said to have been resolved, by all the judges, that where persons write, print, or sell any pamphlet, scandalizing the public or private persons, such

books may be seized, and the person punished by law (*t*).

The practice of issuing a general warrant to seize the papers of a suspected person, appears to have been frequently resorted to, in former times, with great abuse, of which the case of *Lord Coke* himself furnishes an instance; whose papers were seized and carried to the secretary's office, with some valuable securities, which were never returned to him (*u*). Insignificant however is a loss of such a nature when compared with the more serious evils incident to such a procedure, the grievous invasion of domestic peace and security, and the facility with which a person might be made responsible for the contents of writings never in his possession, or deprived of those necessary for the purpose of his defence.

A warrant (*x*) was issued in the name of the Duke of Newcastle, one of the secretaries of state, directed to two of the King's messengers, requiring them, taking a constable, to make a diligent search in the house of Dr. Earbury, the author of a treasonable paper, entitled "The Royal Oak Journal," for all papers of whatsoever

(*t*) 4 Read. St. Law. 154.
(*u*) Dig. L. L. 33.
(*x*) 2 Barnard, K. B. 346. Dig. L. L. 33.

kind in his custody, and to bring the said papers before him; the messengers, without taking a constable to their assistance, entered the defendant's house, seized his papers, and brought them before Mr. De La Faye, who was the duke's secretary and a justice of the peace.

The defendant afterwards applied to the Court of King's Bench to have his papers restored to him, insisting that a secretary of state could not legally grant a warrant to seize a person's papers. Lord C. J. Hardwicke said, that as to seizing the defendant's papers he would not give any opinion whether it was legal or not, that the Court of King's Bench could not grant a rule upon the messenger who did seize them to restore them, and therefore that the question was not properly before the court for their determination.

But in the great case (*y*) of the seizure of papers, it was decided, that a secretary's warrant to search for papers was illegal; and Ld. Camden, C. J. observed, "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary

(*y*) *Entick* v. *Carrington and others*, 11 St. Tr. 317. 19 Howell's St. Tr. 1029.

of state shall think fit to charge or even suspect a person to be the author, printer, or publisher of a seditious libel. This power so assumed by a secretary of state, is an execution upon all the parties' papers in the first instance; his house is rifled—his most valuable secrets wrested out of his possession, before the paper, for which he is charged, be found criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper. This power of the secretary is not supported by one single citation from any law book extant—it is claimed by no magistrate in the kingdom but himself. Papers are the owner's goods and chattels,—they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot, by the law of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of the goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely say there is none; and therefore it is too much for us, without such authority, to pronounce a practice to be legal, which would be subversive of all the comforts of society."

"There is no authority to show that libels

might be seized, except the opinion of the twelve judges, at the close of the reign of C. II., who gave it as their opinion, that no one could legally expose to the public any thing that concerned the affairs of the public, without licence from the King. This was quoted by C. J. Scroggs, on the trial of Harris for a libel, who extended the doctrine to the seizure of all books, pamphlets, and writings, on matters of public concern."

And again, "It is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some case had been shown where the law forceth evidence out of the owner's custody by process."

"In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling; but our law has provided no paper search upon those occasions to help forward the conviction. Whether this proceedeth from the gentleness of the law, or from the consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

"Observe the wisdom as well as the mercy of the law. The strongest evidence before trial, being only *ex parte*, is but suspicion,—it is not

proof: weaker evidence is a ground of suspicion, though in a lower degree: and if suspicion at large should be a ground of search, especially in case of libels, whose house would be safe? Upon the whole, we are of opinion, that the warrant to seize and carry away the parties' papers in case of a seditious libel, is illegal and void."

And the House of Commons (z) afterwards came to a resolution, declaring the seizure of papers, in the case of libel, to be illegal.

Since a criminal proceeding is in its nature local, the offence must be laid and proved to have been committed in the county within which the bill (a) is preferred. And the indictment may be tried at the quarter sessions, before the justices of the peace, as well as before the justices of Oyer and Terminer (b).

With respect to the technical mode of framing an information or indictment, little remains to be added to the observations already made on the subject of the declaration (c).

All who are in any way concerned in the composition, writing, or printing of the libel, with a view to publication, may be joined in the in-

(z) Jour. Comm. 25th April, 1766.

(a) 4 Read. St. Law, 155. 8 Mod. 328. Dig. L. L. 97. Infra, tit. Evidence.

(b) Haw. c. 8. s. 88. *R.* v. *Summers*, 1 Lev. 193.

(c) Supra, vol. 2.

formation or indictment, and charged as principals (*d*).

It is not necessary to allege that the matter published is false, such an allegation need not be proved, though it be made on the record (*e*); but the illegality of the publication must be averred by means of the word *maliciously*, or by some equivalent term (*f*).

In an indictment, as well as in a declaration, the averment of extrinsic facts is unnecessary, where the criminal quality of the publication may be collected from the contents, such averments are essential where the terms of the libel are independently of particular extrinsic facts, innocent or unmeaning, but are in reality noxious and illegal, in connection with the facts to which they relate. The mode of averring such extrinsic circumstances, and explaining the sense of the libel, in its connection with those facts, by means of the ordinary technical links, has already been so far remarked upon, that further comment

(*d*) *R.* v. *Benfield*, 2 Burr. 983. pl. 3. it was held, that a joint information lay against two, for singing a libellous song on A. and B., which abused first A., and then B.; and it was held, that if each had sung separate stanzas, the one reflecting on A., the other on B., the offence would still have been joint.

(*e*) *R.* v. *Burke*, 7 T. R. 4.

(*f*) Sty. 392, per Roll. C. J. 1 Vin. Ab. 533.

is perhaps unnecessary. Where an information alleged that a libel was published of and concerning the government, and the libel was written in such terms, that an ordinary person, on reading it, would understand that it was written of the government of the country, it was held, that any extrinsic allegation, for the purpose of explaining the meaning, was unnecessary (*g*). And where the information alleged that the defendant, with intent to insinuate and cause it to be believed, that divers liege subjects of the King, had been inhumanly cut down, maimed, and killed, by certain troops of our lord the King, unlawfully and maliciously published a libel of and concerning the government of this realm, and of and concerning the said troops, and the only innuendo was applied to the word dragoons in the libel, meaning the said troops of our said lord the King, and meaning thereby, that divers liege subjects of our lord the King had been inhumanly cut down and killed by the said troops of our said lord the King; it was held, on motion in arrest of judgment, that this was sufficiently certain, without specifying what particular troops were meant (*h*).

(*g*) *R.* v. *Burdett*, 4. B. and A. 314.

(*h*) Ib.; and see *R.* v. *Horne*, Cowp. 682, supra. vol. 1, p. 391. To the illustrations already adduced, v. 1. p. 407, to

Unless a libellous and criminal meaning be either apparent on the face of the alleged libel, or

show the nature and use of prefatory averments and innuendos, may be added the following:—*Goldstein* v. *Foss*, 6 B. and C. 152. In the introductory part of the declaration, it was alleged, that the plaintiff was the secretary of a society called "The Society of Guardians, for the protection of Trade against Swindlers and Sharpers," and the nature and object of the society was also averred; the declaration then alleged the publishing of the libel, as a printed report, by the secretary, containing, *(inter alia,)* that the plaintiffs were reported to the society as improper to be proposed to be ballotted for as members thereof, with an innuendo, thereby then and there meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society. And it was held, on a motion in arrest of judgment, that the libel was not sufficiently connected with the introductory matter, and that without such matter the words were not in themselves actionable.

In the case of *Stockley* v. *Clement*, 4 Bingh. 162. the first count alleged, that the plaintiff was lawfully possessed of a bill of exchange, accepted by Frances Page Turner, widow, that such acceptance was a true and genuine acceptance, and that the defendant, intending to charge the plaintiff with having forged and feloniously uttered the said bill of exchange, published of and concerning the said plaintiff and the said bill of exchange, the following libel:—

"To bill-brokers and others—caution—reward—Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26th, 1825, and purporting to be drawn by one John Stockley, upon and to be accepted by the Dowager Lady P. Turner, for £6000, with interest, payable twelve

can be collected from the terms of the libel, as connected with extrinsic circumstances, no innuendo will either make the publication criminal, or subject the publisher to a civil action (*i*).

An indictment, that the defendant scripsit, fecit, et publicavit, *seu* scribi fecit, et publicari causavit, has been held to be too uncertain (*k*).

When some special intention is essential to the

months after date, to the order of the said J. Stockley.—I do hereby give notice, on behalf of the Dowager Lady P. Turner, that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been forged; or her hand-writing to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part, of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument, shall be handsomely rewarded. Thomas Binns."

After a verdict for the defendant, the court held, that, at all events, the action could not be supported without an innuendo, in stating the alleged libel, applying the charge to the plaintiff.

The court also intimated a strong opinion, that, even with an innuendo, the action could not have been supported, as the alleged libel merely stated that a bill had been drawn, but threw no imputation on the drawer.

(*i*) Supra, v. 1, p. 393. And see *R.* v. *Alderton*, Sayer. 280. *R.* v. *Burdett*, 4 B. and A. 314. *R.* v. *Horne*, Cowp. 682. *Stockley* v. *Clement*, 4 Bing. 162, supra. *Goldstein* v. *Foss*, 6 B. and C. 152, supra. 305.

(*k*) 8 Mod. 328, and see v. 1, p. 358.

offence, such intention must be described according to the truth and the nature of the offence. Where the libel has been published to the prosecutor only, though its tendency be to vilify and degrade him in his professional character, it should be alleged to have been published with intent to provoke a breach of the peace (*l*). So where the indictment is founded on a libel written to degrade the memory of one deceased, it should be alleged to have been published with a design to bring contempt on the family of the deceased, and to excite his relations to a breach of the peace (*m*).

The most usual plea in an indictment or information, is the general one of *not guilty*, by which the defendant puts himself generally upon the country for his deliverance, and is entitled to take advantage of every defect in the evidence for the prosecution; or to rebut that evidence by counter proof, tending to convince the jury, either that the act imputed was not committed; or, admitting the publication, to show from the context (*n*), or other circumstances, either that the matter published was not criminal in its nature; or, if criminal, that it was published in-

(*l*) *R.* v. *Wegener*, 2 Starkie, C. 245.
(*m*) *R.* v. *Topham*, 4 T. R. 126.
(*n*) *R.* v. *Lambert and Perry*, 2 Camp. C. 398.

advertently (*o*), and without any guilty knowledge (*p*); or that it was published under circumstances which the law recognizes as constituting either an absolute justification or excuse, independently of the question of intention, or a qualified justification dependent on the actual intention and motive of the defendant (*q*).

(*o*) *R.* v. *Lord Abingdon*, 1 Esp. 226.

(*p*) In the case of the *King* v. *Holt*, 5 T. R. 444. Lord Kenyon, C. J. observed, if the defendant could have shown that he had published the paper in question without knowing its contents, as that he could not read, and was not informed of its tendency till afterwards, that argument might have been pressed upon the jury.

(*q*) Supra, 210.

CHAPTER XV.

Evidence.

WITH respect to the nature of the evidence to be adduced in support of a criminal charge, little need be added to the analagous proofs already mentioned as applicable to civil proceedings; the materials of evidence, and the rules which govern their application are for the most part common to both.

Such evidence in the criminal proceeding relates to the introductory averments, and the act of publication by the defendant of the noxious matter charged (*a*), in the sense imputed by the averments, and with the intention alleged. Whether the introductory averments be proved, is usually matter of fact for the determination of the jury, subject of course to any question of variance from the record.

A Gazette is evidence to prove an averment

(*a*) The court, under the late statute, 9 G. 4. c. 15. has a discretionary power to amend variances between the record and any matter in writing or print produced in evidence. See Appendix.

that certain addresses have been presented to the King (*b*).

So the King's Proclamation for the discovery of certain offenders, reciting that outrages have been committed in certain districts, is evidence to satisfy an introductory averment in an information for a libel, that such outrages had been committed (*b*).

An allegation that the defendant was duly elected treasurer of a particular parish, is proved by an entry in the vestry-book, stating, that he was elected to that office at a vestry held after notice (*c*).

In criminal as well as civil proceedings in case of libel, it is unnecessary to give further proof of facts which the alleged libel assumes to be true (*d*).

(*a*) *R.* v. *Holt*, 5 T. R. 536.

(*b*) *R.* v. *Sutton*, 4 M. and S. 546.

(*c*) *R.* v. *Martin*, 2 Camp. 100. Cor. Macdonald, C. B.

(*d*) Supra, p. 11, and see the observations of Bayley, J. in *R.* v. *Sutton*, 4 M. and S. 548. Where the plaintiff alleged that he held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, &c. and the terms of the alleged libel treated the plaintiff as holding an office of public trust, and charged him with not having given a proper account of the public property; it was held to be evidence of the averment, although the plaintiff's own witnesses showed that the plaintiff's office was not one of trust and confidence, and that he was not trusted with the receipt of money. *Bagnall* v. *Underwood*, 11 Price, 621, and see *Berryman* v. *Wise*, 4 T. R. 366, supra, p. 2.

Where the indictment alleges that the prosecutor, at the time of the libel, filled a particular situation, it is sufficient to prove a previous appointment, without showing its continuance; for the commencement being shown, the continuance will be presumed (*e*). But in criminal as well as civil cases, unless strict proof of appointment be rendered necessary by the particular mode of averment, proof that a party acts in a public office is sufficient primâ facie evidence that he really held it (*f*).

In criminal cases, it is usually sufficient to prove a publication to the party defamed (*g*). But it is necessary to prove a publication in the particular county where the offence is charged to have been committed, in all cases where the fact of publication is of the essence of the offence.

The principal decisions on this subject have already been adverted to. The question of publication is ordinarily one of mere fact, to be decided by the jury: but this, like all other legal and technical terms, involves law, as well as

(*e*) *R.* v. *Budd*, 5 Esp. C. 230, which was an indictment for a libel on Lord St. Vincent, in his character of first Lord of the Admiralty. The prosecutor produced his patent.

(*f*) Supra.

(*g*) Proof of such a publication is not sufficient, where the only intent averred is the intent to injure the prosecutor in his profession as an attorney. *R.* v. *Wegener*, 1 Starkie's C. 543. infra.

fact; and it is a question for the court, in doubtful cases, whether the facts, when proved, would constitute a publication in point of law.

In the case of the *King* v. *Sir F. Burdett* (*h*), the first question was, whether there was sufficient presumptive evidence to warrant a jury in finding that there had been an open publication in the county of Leicester, and of this opinion were Abbott, C. J. and Best, J. Secondly, whether what was termed a close publication, by the delivery of the sealed letter in the county of Leicester, to be conveyed into a different county by the post, amounted to a publication in law in the county of Leicester, and of this opinion were Holroyd and Best, Judges. Thirdly, whether proof of such close delivery and subsequent publication, in such different county, constituted an offence of which the jury could inquire on an indictment in the county of Leicester, and of this opinion were Abbott, C. J. and Holroyd, J.

Holroyd, J. also expressed an opinion, that the composing and writing, with the intention afterwards to publish, amounted to a misdemeanor, and that the jury might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in Leicestershire.

(*h*) 4 B. and A. 95.

Where a libel is found in a man's own custody, but exposed on a shelf in a bookseller's shop, the owner is, it is said, guilty of a publication (*i*).

Proof that the defendant procured a number of placards to be printed, from a manuscript, part of which, when printed, he took away, is sufficient to warrant the reading in evidence one of those copies left with the printer (*k*).

Where the defendant had acknowledged himself to be the author of the libel produced in evidence, errors of the press, and some small variations excepted, his counsel objected that the confession was not absolute, and that, therefore, the libel could not be read; but Pratt, C. J. allowed it to be read, saying, that he would put it on the defendant to prove material variances (*l*).

The provisions of the st. 38 G. 3. which facilitate the proof of publication in proceedings against the editors of newpapers, have already been adverted to (*m*).

By the st. 60 G. 3. and 1. G. 4. c. 9. similar

(*i*) 12 Vin. Ab. 229. 4 Read. St. Law. 455.
(*k*) *R.* v. *Watson*, 2 Starkie's C. 129.
(*l*) *R.* v. *Hall*, Str. 416.
(*m*) Supra, 43.

provisions are made in respect of certain pamphlets containing public news (*n*).

(*n*) By sec. 1, all pamphlets and papers containing any public news, intelligence, or occurrence, or any remarks or observations thereon, or upon any matter in church or state, printed in any part of the united kingdom, for sale, and published periodically, or in parts, or numbers, at intervals not exceeding twenty-six days between the publication of any two such pamphlets or papers, parts or numbers, respectively, shall not exceed two sheets, or shall be published for sale for a less sum than sixpence, exclusive of the duty by this act imposed thereon, shall be deemed and taken to be newpspapers, within the true intent and meaning of an act of parliament passed in the 38th year of the reign of his present Majesty, intituled "An Act for preventing the Mischiefs arising from the printing and publishing Newspapers and Papers of a like Nature, by Persons not known, and for regulating the Printing and Publication of such Papers in other Respects;" and of the several Statutes relating to Stamp Duties.

Sec. 2. enacts, that no quantity of paper, less than a quantity equal to twenty-one inches in length and seventeen inches in breadth, in whatever way or form the same may be made, or may be divided into leaves, or in whatever way the same may be printed, shall be deemed or taken to be a sheet of paper within the meaning and for the purposes of this act.

Sec. 3. That no cover or blank leaf, or any other leaf, upon which any advertisement or other notice shall be printed, shall, for the purposes of this act, be deemed or taken to be a part of any such pamphlet, paper, part, or number aforesaid.

Sec. 4. That all pamphlets and papets containing any public news, intelligence, or occurrences, or any such remarks or observations as aforesaid, printed for sale, and published pe-

riodically, or in parts or numbers, at intervals exceeding twenty-six days between any two such pamphlets or papers, parts or numbers, and which said pamphlets, papers, parts, or numbers, respectively, shall not exceed two sheets, or which shall be published for sale at a less price than sixpence, shall be first published on the first day of every calendar month, or within two days before or after that day, and at no other time, and that if any person or persons shall first publish, or cause to be published, any such pamphlet, paper, part, or number, aforesaid, on any other day or time, he or they shall forfeit, for every such offence, the sum of £20.

Sec. 5. That upon every pamphlet or paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in church or state, printed in any part of the united kingdom, for sale, and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such pamphlets or papers, parts or numbers; and upon every part or number thereof shall be printed the full price at which every such pamphlet, paper, part, or number, shall be published for sale, and also the day on which the same is first published; and if any person shall publish any such pamphlet, paper, part, or number, without the said price and day being printed thereon; or if any person shall, at any time within two months after the day of publication, printed thereon as aforesaid, sell, or expose to sale, any such pamphlet, paper, part, or number, or any portion or part of such pamphlet, paper, part, or number, upon which the price so printed as aforesaid, shall be sixpence, or above that sum, for a less price than the sum of sixpence, every such person shall, for every such offence, forfeit and pay the sum of £20.

Sec. 6. Provided always, that nothing in this act contained shall extend, or be construed to extend, to subject any person publishing any pamphlet or paper to any penalty, for any allowance in price made by the person for whom and on whose

behalf, and for whose profit, benefit, or advantage, the same shall have been first published, to any bookseller or distributor, or other person to whom the same shall be sold, for the purpose of retailing the same.

Sec. 7. That all pamphlets and papers which are by this act declared to be subject to the stamp duties upon newspapers, shall be freed and discharged from all the stamp duties and regulations contained in *any* act of parliament relating to pamphlets.

Sec. 8. That no person, from and after thirty days after the passing of this act, shall print or publish for sale any newspaper, or any pamphlet or other paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in church or state, which shall not exceed two sheets, or which shall be published for sale at a less price than sixpence, until he or she shall have entered into a recognizance before a baron of the Exchequer, in England, Scotland, or Ireland, respectively, as the case may be, if such newspaper or pamphlet, or other paper aforesaid, shall be printed in London or Westminster, or in Edinburgh or Dublin, or shall have executed in the presence of, and delivered to some justice of the peace for the county, city, or place, where such newspaper, pamphlet, or other paper shall be printed, if printed elsewhere, a bond to his Majesty, his heirs, and successors, together with two or three sufficient sureties, to the satisfaction of the baron of the Exchequer taking such recognizance, or of the justice of the peace taking such bond, every person printing or publishing any such newspaper or pamphlet, or paper aforesaid, in the sum of £300, if such newspaper, pamphlet, or paper, shall be printed in London, or within twenty miles thereof; and in the sum of £200 if such newspaper, pamphlet, or paper, shall be printed elsewhere in the united kingdom; and his or her sureties in a like sum, in the whole, conditioned that such printer or publisher shall pay to his Majesty, his heirs, and successors, every such

fine or penalty as may at any time be imposed upon or adjudged against him or her, by reason of any conviction for printing or publishing any blasphemous or seditious libel, at any time after the entering into such recognizance, or executing such bond; and that every person who shall print, or first publish any such newspaper, pamphlet, or other paper, without having entered into such recognizance, or executed and delivered such bond, with such sureties as aforesaid, shall, for every such offence, forfeit the sum of £20.

Sec. 13. And whereas the printer or publisher of any newspaper, or of any pamphlet and paper hereby enacted to be deemed and taken to be a newspaper, will, after the passing of this act, be bound under and by virtue of the provisions contained in the said acts, made and passed in the 38th and 55th years of his Majesty's reign respectively, to deliver to the commissioners of stamps in Great Britain and Ireland, respectively, or some distributor of stamps, or other officer, on the day on which the same is published, or within a certain time afterwards, one of the newspapers, pamphlets, or papers, so published, signed as in the said acts is respectively directed. And whereas it is expedient that the same, or similar provisions and regulations should extend and be applied to all pamphlets and papers, whether published periodically or not, and which shall contain any public news, intelligence, or occurrence, or any remarks or observations thereon, or upon any matter in church or state, and which shall not exceed two sheets as aforesaid, or which shall be published for sale at a less price than sixpence. Be it therefore enacted, that from and after ten days after the passing of this act, the printer or publisher of any pamphlet, or other paper for sale, containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or on any matter in church or state, shall, upon every day upon which the same shall be published, or within six days after, deliver to the commissioners of stamps for Great Britain and Ireland, respectively, at their

head offices, or to some distributor or officer, to be appointed by them to receive the same, and whom they are hereby required to appoint for that purpose, one of the pamphlets or papers so published upon each such day, signed by the printer or publisher thereof, in his hand-writing, with his name and place of abode, and the same shall be carefully kept by the said commissioners, or such distributor, or officer, as aforesaid, in such manner as the said commissioners shall direct; and such printer or publisher shall be entitled to demand and receive from the commissioners, or such distributor or officer, the amount of the retail price of such pamphlet or paper so delivered; and in every case in which the printer and publisher of such pamphlet or paper shall neglect to deliver one such pamphlet or paper in the manner herein before directed, such printer and publisher shall, for every such neglect, respectively, forfeit and lose the sum of £100.

Sec. 14. Provided always, that in case the said commissioners, or such distributor, or officer aforesaid, shall refuse to receive or pay for any copy of such pamphlet or paper offered to be delivered to them or him as aforesaid, for or on account of the same, not being within the true intent and meaning of this act, such commissioners, distributor, or officer, shall, if required so to do, give or deliver to such printer or publisher a certificate in writing, that a copy of such pamphlet or paper had been by him duly offered to be delivered, and such printer or publisher shall thereupon be freed and discharged from any penalty, for not having delivered such copy as aforesaid.

Sec. 18. That it shall be lawful for any two or more justices of the peace, in all cases in which they are authorized to hear and determine any offence or offences which shall be committed against this act, or any other act or acts of parliament which are by this act required to be construed therewith as part thereof, upon information exhibited, or complaint made in that behalf, within three months after any such offence committed, to summon the party accused; and also

the witnesses on either side, and upon the appearance or contempt of the party accused, in not appearing, to proceed to the examination of the witness or witnesses upon oath, (which oath they are hereby empowered to administer,) and to give judgment for the penalty or penalties incurred; and, in case the party shall not immediately pay the said penalty or penalties, to commit the offender to prison, there to remain for any time not exceeding six months, unless such pecuniary penalty or penalties shall be sooner paid and satisfied; and if any party shall find himself or herself aggrieved by the judgment of any such justices, then he, she, or they, may, upon giving security to the amount or value of the penalty or penalties adjudged, together with such costs as may be awarded, in case such judgment shall be affirmed, appeal to the justices of the peace at the next quarter or general sessions of the peace for the county, riding, division, or place, wherein such offence shall be committed, who are hereby empowered to summon and examine witnesses upon oath, and finally to hear and determine the same; and, in case the judgment shall be affirmed, it shall be lawful for such justices to order the person or persons making such appeal, to pay such costs occasioned by such appeal as to them shall seem meet: provided, nevertheless, that it shall and may be lawful for the said respective justices, where they shall see cause to mitigate or lessen any such penalty or penalties, in such manner as they, in their discretion, shall think fit, the reasonable costs and charges of the officers or informers, being always allowed over and above such mitigation, and so as such mitigation does not reduce the penalty to less than one-fourth part thereof over and above the said costs and charges.

Sec. 19. That if any person shall be summoned as a witness to give evidence before such justices of the peace touching any such offence, either on the part of the prosecutor, or of the person or persons accused, and shall neglect or refuse to appear at the time and place to be for that purpose appointed,

Where the publication of the libel has been proved, either the prosecutor or the defendant (*o*) is entitled to have extracts read from different parts of the same paper or book relating to the same subject.

The sale of every distinct copy of a libel is a separate offence (*p*); and, therefore, a conviction or acquittal on an indictment for publishing one copy would be no bar to an indictment for publishing another copy.

It is almost superfluous to observe, in this stage of the present work, that, in criminal as well as civil proceedings, it is for the jury, in all cases of doubtful application, to judge of the defendant's intention to apply the words or libel to particular subject matter, according to the averments in the indictment (*q*). Thus, where the

without a reasonable excuse for such his or her neglect or refusal, to be allowed of by the justices before whom the prosecution shall be depending, or appearing shall refuse to give evidence, then every such person shall forfeit, for every such offence, any sum not exceeding £20, to be levied and paid in such manner and by such means as is in this act directed as to other penalties.

(*o*) *R.* v. *Lambert*, 2 Camp. 398.

(*p*) *R.* v. *Carlisle*, 1 Chitty, 451.

(*q*) Supra, vol. 1, —. In the case of *Yrissari* v. *Clement*, 3 Bingh. 432. the alleged libel contained *(inter alia)* the following passage :—" He lost no time in transferring himself with £200,000 of John Bull's money to Paris, where he now

intention to apply defamatory remarks to the prosecutor, is rendered doubtful and ambiguous, by the defendant having left blanks for names, or from his having given merely the initials, or introduced fictitious names, it is always a question for the opinion and judgment of the jury, whether the prosecutor was the party really aimed at (*r*). For this purpose the judgment and opinions of witnesses, who, from their knowledge of the parties and the circumstances, are able to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury (*s*).

Any further observations on the subject of evi-

out-tops princes in his style of living, (meaning and intending thereby, that the said plaintiff had fraudulently obtained £200,000 sterling of the money of the English subjects of our sovereign lord the King, and had fled from the country with the same.) It appeared, from the context, that the intention of the writer was rather to charge the plaintiff with fraud on the people of Chili than on the people of England; and on this ground, after a verdict for the plaintiff, with £400 damages, the court granted a new trial.

(*r*) See the observations and opinions of the judges, supra, vol. 1, p. 54, et sequent.

(*s*) Supra, 52. Lord Ellenborough held, that the declarations of spectators, while they looked at a libellous picture, publicly exhibited in an exhibition room, was evidence to show that the figures pourtrayed were meant to represent the parties alleged to have been libelled. *Du Bost* v. *Beresford*, 2 Camp. G. 512.

dence to prove general malice seem to be unnecessary. The rule of law on this subject in criminal, is analogous to that in civil proceedings. If the publication, considered either abstractedly or in connection with the extrinsic facts alleged, be calumnious, injurious, and criminal, either because it conveys some offensive and noxious imputation, or exposes an individual to the hatred and contempt, or even to the ridicule of others, and no circumstances appear which, in legal consideration, supply either an absolute or even qualified defence, malice, if material, is yet but a mere inference of law, which the jury are bound to find, according to the direction of the court (*t*).

(*t*) Supra, 240, and see Vol. 1. p. 209. 292. In the case of *Levi* v. *Milne*, 4 Bingh. 195, the defendant published some doggrel verses on the plaintiff, (a bailiff,) describing an inefficacious attempt on his part to arrest a party of whom he was in search. The publication was headed by a woodcut, styling the plaintiff *Levy the bum*. The jury inquired, whether one shilling would carry costs, and being answered in the affirmative, found a verdict for the defendant. The court, under the circumstances, granted a new trial, on the ground that the jury had taken upon themselves to judge of the law of the case; and Best, C. J. said, it has been urged that, in cases of libel, the juries are judges of the law as well as of fact; but I beg to say that juries are not judges of the law, or, at any rate, not in civil actions. The authority on which that position is grounded, is the 32 G. 3. c. 60. which was the famous bill brought in by Mr. Fox, or, more pro-

If, on the other hand, there be circumstances which supply a justification or excuse, provided the defendant acted honestly, with a view to the occasion, and was not actuated by express collateral malice, then it lies on the prosecutor to prove such express malice, or malice in fact.

Where a publication, with a specific intention is alleged, such intention must be proved accordingly.

perly, by Lord Erskine; but whoever reads that act, will see that it does not apply to civil actions; it applies only to criminal cases. There is nothing in it that in any way touches civil actions, and the jury, with respect to them, stand in the same situation as they have ever done. I mean, however, to protest against juries, even in criminal cases, becoming judges of the law; the act only says, they may give a general verdict." And see 4 B. and A. 131. In the case of *Blackburn* v. *Blackburn*, 4 Bing. 395, the learned judge left it to the jury to say, whether, supposing the alleged libel was a privileged communication, they found express malice. The jury negatived express malice, and found a verdict for the plaintiff, with £50 damages. The court were of opinion, on a motion for a a new trial, that the communication was not a privileged one, and that the plaintiff was entitled to retain his verdict.—The plaintiff having the defendant's bond, advertised it for sale; the defendant published a statement of the circumstances under which the bond had been given, with this conclusion:—"His object either is to extract money from the pocket of an unwary purchaser, or, what is more likely, to extort money from me." And it was held, that the publication was clearly libellous, and that no proof of express malice was necessary. *Robinson* v. *M'Dougall*, 4 Bing. 670.

Where a letter is alleged to have been written and sent with intent to provoke the party to whom it has been sent to commit a breach of the peace, such intent must be proved as laid. So where the publication is averred to have been made with intent to defame particular magistrates, or to bring the administration of justice into contempt. But allegations of intent are usually divisible, and where two distinct intents are charged, either of which would have supported the indictment, it is sufficient to prove either of them (*u*).

Where the indictment alleged a publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney, it was held, that the mere proof of a publication to the prosecutor only did not support the indictment, and that the publication ought to have been averred to have been made with intent to provoke and excite the prosecutor to a breach of the peace (*x*).

Where the name of the party calumniated is left in blank, general evidence by those who know him is sufficient for the purpose of proving that he was the person meant; but such evi-

(*u*) *R.* v. *Evans*, supra, vol. 1, p. 439. See also vol. 1, p. 408.

(*x*) *R.* v. *Wegener*, 1 Starkie's C. 543. Cor. Abbott, C. J.

dence is insufficient, if it turn out, upon inquiry, that the witness derives his conclusion, merely from the terms of another libel, with the publication of which the defendant had no concern (*y*).

In general, it is competent to the defendant to adduce any evidence in contradiction of that which has been adduced on the part of the prosecution. He may show that his delivery of the libel was not a wilful or blamable one, and that he acted under an honest ignorance of the contents or quality of the libel, without knowing or having reason to apprehend that the act was illegal. And though, as has been already seen, a strong presumption of criminal knowledge or culpable connivance is usually and necessarily entertained against booksellers, where libels are sold by their agents, yet, as a man cannot offend criminally, unless some degree of blame or negligence be imputable to him, it seems to be clear that this presumption is not conclusive in its nature, but may be repelled by proof of fraud or surprise, or such other circumstances as are calculated to overcome that reasonable degree of vigilance and supervision which a cautious man ought to exercise in so responsible a vocation.

He may, also, under the plea of not guilty, give in evidence any collateral facts which raise

(*y*) *Bourke* v. *Warren*, 2 C. and P. 307.

either an absolute justification, independently of the question of actual intention, or a qualified justification or excuse dependent on the question of good or evil intention; and also, in the latter case, may adduce such evidence as tends to show that he acted *bonâ fide* for a legal object, and not for any civil or vexatious purpose.

It is not competent to the defendant to show that others have published similar papers, without having been prosecuted (*z*), for such persons have no opportunity given to defend themselves, and one defendant cannot excuse himself by showing that others have also been criminal.

Matters available in mitigation of punishment are usually reserved till after the trial, and are exhibited to the court upon affidavits. In some instances, however, such evidence is received at the trial. Thus, evidence has been received to show that the defendant, when proceedings were instituted, stopped the sale of the obnoxious work (*a*).

(*z*) *R.* v. *Holt*, 5 T. R. 436.

(*a*) *R.* v. *Hone*, Manning's Ind. 198.

CHAPTER XVI.

Of the Trial and Verdict.

THE verdict in this, as in other criminal proceedings, is either a general verdict of condemnation or acquittal; or a special verdict, by which the jury find the facts, and refer the questions of law to the court.

The offence consists of the act of publishing the matter set forth on the record, in the sense attributed by the innuendos, with the intention alleged, maliciously without any legal justification or excuse. The fact of publishing the illegal matter, and of its being published in the particular sense alleged, are ordinarily questions of fact for the jury, subject, of course, to the opinion and judgment of the court, whether the facts proposed to be proved would be, when proved, sufficient in point of law, to constitute a publication and to support the innuendos.

Whether the defendant published the alleged libel wilfully and designedly, and whether he did so with the particular intention specified in the

information or indictment, are also questions of fact for the determination of the jury. Till these facts are determined by the jury, the court cannot otherwise than hypothetically form any judgment on the question of guilt or innocence. On the other hand, the quality of the alleged libel, as it stands on the record, either simply or as explained by averments and innuendos, is purely a question of law for the consideration of the court.

This position requires little support from observation or comment; it rests not only on precedent, but legal analogies, and on obvious grounds of reason and convenience. Upon a demurrer, motion in arrest of judgment, or writ of error, this question is necessarily one of mere law, and the court is called on to pronounce, whether, assuming the alleged libel to have been published in the sense pointed out by the averments, and with the intention averred, it amounts, in point of law, to a libel. The court, in such cases, must necessarily decide the question of libel, or no libel, as a question of law; it cannot, therefore, be a question of fact; it is obvious that the opinion and judgment of the jury on the subject must be immaterial, when it is considered that the defendant may wholly withdraw the question from their consideration by a demurrer, or that, even after their decision, the question is still open

on the record, and must be decided by the court, independently of the opinion of the jury, before they can pronounce any penal sentence.

The question remains, whether the publication of the libel alleged was a malicious or wrongful publication; for, though the fact of publishing, and the illegal and noxious quality of the thing published be beyond dispute, yet the act of publication may be perfectly innocent; so far from being illegal, it may have been an act meritoriously done, for the very purposes of justice. And, therefore, as not merely a publication, but a malicious or wrongful publication must be averred, so must such a malicious and wrongful publication be found by the jury, either by means of a general verdict of guilty, which comprehends the whole of the charge, or by a special finding of a malicious and wrongful publication, or, at least, by negativing the existence of any legal justification or excuse.

Where the circumstances and occasion of publishing are such as amount to a legal justification or excuse, independently of the question of intention, the existence of those facts is, of course, for the consideration and decision of the jury; but whether, when ascertained, they amount to a legal justification or excuse, is obviously a mere question of law for the opinion and judgment of the court. It is, for instance, a question of mere

fact, whether the alleged libel was published by way of petition to parliament, and whether it was made according to the course and order of such like proceedings in parliament, but whether the occasion justifies a publication so made, is a question of law.

So, again, it is a question of law, whether the occasion and circumstances of the publication furnish a *qualified* justification or excuse dependent on the actual intention of the defendant; but when that is the case, and the guilt or innocence of the defendant turns upon the question, whether he acted with an evil and mischievous intention, or *bonâ fide,* and with a view to some legal object, the question of malicious intention is a conclusion of fact to be drawn by a jury, on a consideration of the terms of the alleged libel, and all the circumstances of the case. If the matter charged to be libellous were contained in a letter, sent by the defendant to the prosecutor, and the defence were, that the charges it contained were stated not with intent to provoke or exasperate, but were written for the purpose of honest remonstrance and admonition, it would be for the jury to decide, under all the circumstances, considering the situation of the parties, the conduct of the defendant, and the language used, whether the act in reality originated in a sincere and honest intention, or in an evil and sinister motive which warranted a conviction.

Again, where there is no evidence of such facts and circumstances as would, if found by the jury, raise either an *absolute* justification, independently of the question of intention, or a *qualified* justification or excuse, dependent on actual intention, then if the question of malice is to be regarded as a question of fact for the jury, it is undoubtedly one which they ought, in that predicament, to draw from the commission of a noxious act. It is a plain and obvious principle, in morals as well as law, that every one must be taken to contemplate and intend the natural and immediate consequences of the act which he does, and the means which he uses. The question of malice may, it seems, in every such case, be more properly regarded as a mere legal inference, arising from the doing of an unlawful act, without legal excuse, than as a question of fact; malice, in such case, meaning nothing more than the entire absence of legal excuse. Be this as it may, in this case, as well as others, it is clear, for the reasons already adverted to, that in order to warrant a legal judgment of condemnation, the jury must, by their verdict, find that the act was done maliciously or wrongfully, or in such other manner as is sufficient to negative the question of any legal justification or excuse; till then, the presumption of innocence is not excluded, still less is the criminality of the act established.

The common law doctrine, as to trials for libel, on these points seems to remain still the same, notwithstanding the statute 32 G. 3. c. 60. by which such trials on informations and indictments are regulated; the effect of this statute seems to be simply to remove some doubts which had existed, and some peculiarities which had prevailed in practice, with respect to trials for libel, and to restore the ordinary course and order of the common law.

The practice which, after much legal discussion, at last occasioned the passing of the Libel Bill, was this,—the court, on criminal trials for libel, and where there were no facts or circumstances which raised any justification or excuse in point of law, directed the jury to find the defendant guilty, if they were satisfied as to the fact of publication and the truth of the innuendos. To this it was objected, that in the case of libel, as well as in all others, it was for the *court* to pronounce an opinion on the legal quality of the act, for the guidance of the jury, and that the *fact of criminal intention* was peculiarly for the jury, who were to give their verdict on the whole of the case. A minute attention to the history of this question, would probably show that, if the jury in such cases did not violate their duty, in taking on themselves to decide matters of law, this apparent deviation from the ordinary practice was wholly imma-

terial, as to the final result; that, on the one hand, the course adopted by the courts was occasioned by their anxiety to prevent juries from exceeding their authority, in cases where strong prejudices were likely to operate; and that, on the other hand, defendants probably expected to derive benefit from the operation of such causes, where it was possible that juries might be willing to warp the law according to their feelings and prejudices, and shelter themselves under a general verdict. In ordinary practice, it is, no doubt, for the court to direct the jury, as to the criminal quality of the acts which the evidence tends to prove. Upon a charge of forgery, where evidence is given that the prisoner altered a genuine instrument, the court informs the jury whether that alteration amounts, under the circumstances, if the facts be proved, to the offence of forgery: in larciny, whether the particular act of which evidence is given, amounts to an asportation sufficient to warrant a charge of felony; and this is obviously necessary in all cases where the charge is stated, by the aid of any general terms, on the face of the record, and the question arises, whether the particular facts proved are sufficient, in point of law, to support that charge; in all such cases, the jury would not be warranted in pronouncing a general verdict of guilty, except upon information, in point of law, that the facts were sufficient in point

of law, to satisfy the allegation on the record; and it is no doubt the duty of the court to supply this information. The case of libel is peculiar, for there the libel itself is set out on the record, and though the court, at the trial, should not give an opinion on the criminal quality of libel, yet if the matter published were not in law a libel, no penal judgment could afterwards be pronounced. Assuming, therefore, that the alleged libel was, in point of law, no libel, the only difference would be, that, according to the ordinary practice, the defendant would be entitled to his acquittal upon the trial by the jury, whilst according to the former practice, in case of libel, the defendant might be convicted at the trial, but would be entitled to arrest of judgment, by reason of the defect on the record.

With respect to the latter objection, viz. that the question of *intention* ought to be left to the jury, as a question of fact, it is to be observed, that the practice of advising the jury to find the defendant guilty, on proof of the fact of publication and of the proof of the innuendos, was confined to those cases where no legal justification or excuse, either of an absolute, or qualified nature as dependent on actual malice, arose out of the circumstances; and, consequently, where the only question was, whether malice was not a mere legal inference from the very act of publishing illegal matter; in such cases, therefore, that

is where the matter published was libellous, and there was a total absence of any legal justification or excuse, there was no real question of intention to be left to the jury.

Having made these remarks, for the purpose of showing to what extent the practice which occasioned the Libel Bill differed from the ordinary course, and that the deviation, though anomalous and unnecessary, and to that extent at least objectionable, was more apparent than real, it will be proper to advert to the different cases which have occurred in relation to this question.

After the abolition of the Star Chamber, which in cases of libel exercised an unbounded control over both law and fact, the cognizance of such offences reverted to the court of King's Bench, to be exercised in the constitutional mode by the intervention of a jury; and till some time after this period, no doubt seems to have been entertained of the right of a jury to give a general verdict in the case of libel, as well as in any other criminal proceeding.

In the year 1670 (*a*), two Quakers, Penn and Mead, indicted for seditiously preaching to a multitude tumultuously assembled in Gracechurch Street, were tried before the Recorder of London, who told the jury, that they had nothing to do but to find whether the defendants had preached

(*a*) *Bushel's* case, Vaughan. Rep. 135.

or not; for that, whether the matter or the intention of their preaching was seditious, were questions of law but not of fact, which they were to keep to at their peril. The jury first found Penn guilty of speaking to the people in Gracechurch Street. This verdict having been refused by the recorder, the jury again retired, and afterwards brought in a general verdict of acquittal; this the court considered as a contempt, and set a fine of forty marks on each of them, and directed them to be confined till the fine should be paid. Edward Bushel, one of the jurors, refused to pay the fine, and being imprisoned in consequence of his refusal, sued out his writ of habeas corpus, which was returned, together with the cause of his commitment, "his acquittal of Penn and Mead against the law of England, against the evidence, and against the direction of the court on matter of law."

Lord Chief Justice Vaughan, on the latter part of the return, observed, "The words that the jury did acquit, against the direction of the court in matter of law, literally taken and *de plano,* are insignificant and unintelligible; for no issue can be joined of matter in law, no jury can be charged with matter in law barely, no evidence ever was or can be given to a jury of what is law or not, nor no such oath can be given to or taken by a jury to try matter in law, nor no attaint can lie for such a false oath."

"Therefore we must take off this veil and colour of words, which make a show of being something, and in truth are nothing.

"If the meaning of these words, finding against the direction of the court in matter of law, be, that the judge having heard the evidence given in court, for he knows no other, shall tell the jury upon this evidence, the law is for the plaintiff or for the defendant, and you are under the pain of fine and imprisonment to find the contrary, then the jury ought of duty so to do, every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong; and, therefore, the trials by them may better be abolished than continued, which were a strange new found conclusion, after a trial so celebrated for many hundreds of years.

"For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, so knowing the fact shall then resolve what the law is, and order the jury severally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all."

Upon the trial of Nathaniel Thompson (*c*) and

(*b*) *Bushell's* case, Vaughan. Rep. 135.

(*c*) 3 St. Tr. 37. The object of the publication was to prove that Green, Berry, and Hill, had been improperly convicted of the murder of Sir Edmundbury Godfrey.

others for composing and publishing libellous remarks upon the administration of justice, the chief justice (*d*) concluded his observations to the jury, by saying—"Gentlemen, I do leave it to you, whether upon this evidence you do not believe them all to be guilty of this design of traducing the justice of the nation."

In the case of the Seven (*e*) Bishops, who were indicted for having offered a petition to the King, which was alleged to be a libel, the judges, who seemed no ways inclined to favour the defendants, would not accede to the doctrine of the counsel for the crown, who contended that the malice and sedition, wherewith the prelates were charged, arose by construction of law out of the fact, and that the jury had nothing to concern themselves with but the fact of the publication in Middlesex.

The defendants had given in evidence several parliamentary documents, to prove that the dispensing power claimed by the king, and against the exercise of which the petition of the bishops was directed, was illegal. The then attorney-general, after some slight remarks upon this evidence, was about to conclude with a somewhat flippant expression of regret, that the defendants'

(*d*) Sir Francis Pemberton.
(*e*) St. Tr. 4 J. 2.

counsel had spent their time to so little purpose, when the chief justice observed, "Yes, Mr. Attorney, I'll tell you what they offer, which it will lie on you to give an answer to,—they would have you show how this has disturbed the government or diminished the King's authority." The attorney-general then contended, that malice or sedition arises by construction of law out of the fact; and that if the thing be illegal, the law says it is seditious, and a man shall not come and say he meant no harm by it.

And afterwards, whilst the solicitor-general was speaking, the chief justice interrupted him, by requesting him to come to the business before them, and to show that the alleged libel was in diminution of the King's prerogative, or that he ever had such a prerogative.

Upon summing up to the jury, the chief justice, after addressing the jury upon the point of publication, proceeded, "If you believe this was the petition they presented to the King, then we must inquire whether this be a libel." The chief justice then proceeded to intimate his opinion, that the publication in question was a libel, but as it was a point of *law*, invited his brethren to give their opinions.

This the other judges proceeded to do.

Justice Holloway concluded by saying, "I

cannot think it is a libel; it is left to you, gentlemen, but that is my opinion."

Powell, *J.* also delivered his opinion to the same effect, leaving the issue to the conscience of the jury.

And afterwards, when the jury retired to determine upon their verdict, they were permitted to take with them the alleged libel.

Upon the trial of John Tutchin (*f*), upon an information for publishing a libel entitled the *Observator,* Lord Holt, C. J. after reading the printed papers alleged to be libels, told the jury, "Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government." The learned judge, it is true, concluded his address, as was afterwards observed by Lord Mansfield, C. J., by saying, "If you are satisfied that he is guilty of composing and publishing these papers in London, you are to find him guilty." But these words have immediate reference to the ground of defence upon which Mr. Tutchin's counsel meant to rely; namely, that the offence had not been proved to have been committed in London, and cannot be considered as used for the purpose of withdrawing the attention of the

(*f*) 4 St. Tr. 659.

jury from the quality of the publication, upon which they had just before received instructions; and indeed to suppose it had so meant would prove too much, since if so, the jury were directed not to find the truth of the innuendos.

The first instance that appears where the court directed the jury to find the defendant guilty, if they were satisfied with the evidence of publication, appears to be that of the *King* v. *Clerk* (*g*), for publishing Mist's Weekly Journal. It appeared, upon evidence, that the defendant acted merely as servant to a printer; that his business was to clap down the press, and there was little or no proof of a guilty knowledge of the contents of the paper, or of his being concerned in a criminal act. It was objected by Serjeant Hawkins, that the charge of a malicious and traitorous design was not supported by the evidence, from which it appeared that the defendant acted ignorantly and in obedience to his master's directions. But it was answered, that since the defendant was merely charged with the publishing a seditious libel, the malice was immaterial; and Lord Raymond, Chief J. informed the jury, that the fact of printing and publishing only was in issue.

And the same learned judge, upon the trial of

(*g*) 2 G. 2. 1729. Barnard. K. B. 304.

an information (*h*), directed the jury, "that there were three points for consideration: the fact of publication, the meaning, (these two for the jury,) the question of law or criminality for the court *upon the record.*"

Lord Chief Justice Lee gave the same direction in the *King* v. *Owen* (*i*), and Lord Chief Justice Ryder followed his example in the case of the *King* v. *Nutt* (*k*).

Lord Mansfield, soon after his appointment to the high office of chief justice, laid down (*l*) the same doctrine in the case of the *King* v. *Shebbeare*; and though the same learned judge repeated the same directions in a number of similar cases, all disquisition upon the province of the jury on these points seems to have slept, till the verdict given in the case of the *King* v. *Woodfall* (*m*). That was the case of an information filed by the attorney-general for publishing a seditious libel signed *Junius*; the jury found him guilty of the printing and publishing ONLY.

Upon motion to arrest the judgment, it was insisted upon for the defendant, that a criminal

(*h*) 9 St. Tr. 255.
(*i*) 10 St. Tr. App. 169. 25 G. 2. K. B. MSS. Dig. LL. 67.
(*k*) Per Lord Mansfield, 3 T. R. 430 in the notes.
(*l*) Ib.
(*m*) 5 Burr. 2661.

intention is the essence of the offence; and that since they had not found malice, it must be taken not to have existed, since a verdict could not be supplied by inference; but that, at all events, the verdict was imperfect, and that there should be a new trial. For the crown it was argued, that the law would collect the intention from the libel itself, that the printing and publishing were all the jury had to inquire about, and that the intention might be collected from the libel itself.

Lord Mansfield, C. J. in delivering the judgment of the court, observed, "there may be cases where the fact proved as a publication may be justified, or excused as lawful or innocent; for no fact which is not criminal, in case the paper be a libel, can amount to a publication, of which the defendant ought to be found guilty. But no question of that kind arose in this case, therefore I directed the jury to consider whether all the innuendos, and all the applications to matters and persons, made by the information, were in their judgments the true meaning of the paper; if they thought otherwise, they should acquit the defendant, but if they agreed with the information, and believed the evidence as to the publication, they should find him guilty." The learned judge then proceeded to observe, that if proof of the express intent of the defendant were requisite, the direction was wrong; but that, whether

the paper was in law a libel, was a question of law upon the face of the record; and that the epithets in the information were formal inferences of law from the printing and publishing. That the verdict finds only what the law infers from the fact; that where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification lies upon the defendant, and in failure thereof the law implies a criminal intent."

Having thus declared his opinion upon the subject of libel, in the propriety of which his brethren agreed with him, Lord Mansfield then proceeded to deliver the sense of the court upon the verdict before them; the substance of which was, that as a doubt had arisen from the introduction of the ambiguous and unusual word *only* into the verdict, there should be a *venire de novo* (*n*),

The legality of the doctrines laid down by Lord Mansfield in *Woodfall's* case, appears to have been expressly decided upon by the Court of King's Bench, for the first time, in the case of the *King* against (*o*) *Wm. Davies Shipley*, Dean

(*n*) *Woodfall's* case, 5 Burr. 2661.

(*o*) 3 T. R. 428, in the notes. See also *Ridgway's* Speeches of the Hon. Thomas Erskine, vol. 1.

of St. Asaph. The defendant was tried before Mr. J. Buller, at Shrewsbury(*p*), upon an indictment, charging him with having published a malicious, seditious, and scandalous libel, entitled "The Principles of Government, in a Dialogue between a Gentleman and a farmer," with intent to incite the King's subjects to attempt, by force and violence, to make alterations in the government, state, and constitution of the kingdom. The fact of publication was clearly proved; and of the truth of the innuendos there was no doubt, since they merely averred, that by the letter G., was meant gentleman; by F., farmer; by the King, the King of Great Britain. One witness for the defendant stated, that upon his informing him, that some gentlemen were of opinion the publication might do harm, the defendant answered, he should be sorry to publish any thing that tended to sedition; that some time after, he said, upon reading it at a public meeting, "I am now called upon to show that it is not seditious, but I read it with a rope about my neck;" and that upon another occasion (*q*), when he had read it, he gave his opinion *that it was not quite so bad.*

The learned judge, on summing up the jury,

(*p*) Aug. 6th, 1784.

(*q*) *Ridgway's* Speeches of the Hon. Thomas Erskine.

declared, that it was not for him to say whether the pamphlet was or was not a libel; and concluded his address to them in these words:—"If you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the innuendos, in point of law, you ought to find him guilty; if you think they are not true, you will acquit him." The jury brought in their verdict "guilty of publishing ONLY." The learned judge then informed them, that by such a verdict they would negative the meaning of the innuendos, but that if they left out the word *only*, the question of law would be open upon the record, and that the defendant might move in arrest of judgment. Upon this direction, Mr. Erskine (the defendant's counsel) said, "I beg to ask your lordship this question, whether, if the jury find him guilty of publishing, leaving out the word *only*, and if the judgment be not arrested by the court of King's Bench, the sedition will not stand recorded?"

Mr. J. Buller. "No, it will not; unless the pamphlet be a libel in point of law." The jury then returned their verdict, "Guilty of publishing, but whether a libel or not we do not find."

Upon a motion for a new trial, on the ground of a misdirection by Mr. Justice Buller, the counsel for the defendant urged the following points—

1. That in every criminal case, upon a plea of not guilty, the jury are charged generally with the defendant's deliverance from that crime, and not specially from any single fact. Upon this topic it was urged, that the rules of pleading in civil cases were framed for the purpose of preserving the jurisdiction of the court and jury distinct, by a separation of the law from the fact; but that in criminal cases, no such boundary was ever attempted;—that, on the contrary, it had been the custom, from the time of the Norman conquest, for the defendant to throw himself upon his country for deliverance, upon the general issue of not guilty, and to receive from the verdict of the jury a complete, general, and conclusive deliverance.

In support of this doctrine, the opinions of Sir Wm. Blackstone, Sir M. Hale, Sir Mich. Foster (*r*), and Lord Raymond, were (*s*) referred to, and thence assuming that the jury had a right to give a general verdict, it was contended, that to enable them to do so, it was the duty of the judge to direct them upon the law; and that having omitted so to direct them, and having informed the jury, that neither the illegality of the paper, nor the intention of the defendant, were within

(*r*) Foster, 256.

(*s*) 2 Lord Ray. 1494.

their jurisdiction, the defendant had, in fact, been found guilty without any investigation of his guilt, and without any power left to the jury to take cognizance of his innocence.

That 2dly. No act is in itself a crime, as abstracted from the malicious intention of the actor, the establishment of the fact being nothing more than evidence of the crime, and not the crime itself, unless the jury render it so by referring it voluntarily to the court by special verdict. That in every case, a general verdict, which is as comprehensive as the issue, unavoidably involves a question of law as well as fact, and therefore that a judge who means to direct a jury to find generally against a defendant, must leave to their consideration every thing which goes to the constitution of that general verdict, and to direct them how to form that general conclusion of guilty, which is compounded of both law and fact.

That the verdict must be taken to be either general or special; if general, it had been found without a co-extensive examination—if special, the term guilty could have no place in it: that the term guilty was either operative and essential, or a mere epithet of form; if essential, then a conclusion of criminal intention had been obtained from the jury without permitting them to exercise their judgment on the defendant's evi-

dence—if formal, no judgment could be founded on it.

3dly. That the circumstance of the libel's appearing upon the record did not distinguish it from other criminal cases. For first, the whole charge does not always appear upon the record; since a part of a publication may be indicted, and may, when separated from the context, bear a criminal construction; and since the court is circumscribed by what appears upon the record, the defendant could neither demur to the indictment nor arrest the judgment after a verdict of guilty. That the defendant is equally shut out (by the doctrine insisted on) from deriving any aid from context, in his defence before a jury, for though he should read the explanatory context in evidence, he can derive no advantage from reading it, if the jury are bound to find him guilty of publishing the matter contained in the indictment, however its innocence may be established by a view of the whole work; that the only operation of the context, is to show the matter upon record not to be libellous, from the consideration of which, as being matter of law for the consideration of the court, they are excluded: that to allow the jury to go into the context, in order to form a correct judgment of the part indicted, is a palpable admission of their right to judge of the merits of the paper and the

intention of its author; and that it would be preposterous to say that the jury have a right to decide a paper criminal as far as appears upon the record, to be legal, when explained by the whole work, of which it is a part; but that they have no right to say, that the whole work, if it happen to be set out on the record, is innocent and legal.

That it is equally absurd to contend that the intention of the publisher may be shown as a fact by the evidence of any extrinsic circumstances—such as the context; and in the same breath to say that it is an inference of law from the act of publication which the jury cannot exclude. That the consequences of such a doctrine would be most dangerous, since, if a seditious intention could be inferred from publishing any paper, charged to be a libel, a treasonable intention might with equal reason be inferred from publishing a paper charged to be an overt act of treason.

4thly. That a seditious libel contains no matter of law; for the court, in considering the question of a libel, as it appears upon the record, are circumscribed in forming their judgment, and can derive no assistance from extrinsic circumstances; since, if they were to break through their legal fetters, their judgment would be founded in facts, not in evidence: but that such

objections would vanish if the seditious tendency be considered as a question of fact, since the jury can examine, by evidence, all those circumstances, which establish the seditious tendency of the paper, from which the court are shut out.

5thly. That in all cases when the mischievous intention, which is the essence of the crime, cannot be collected by simple inference from the fact charged, because the defendant goes into evidence to rebut such inference, the intention becomes a pure unmixed question of fact for the consideration of the jury. That "the publication (*t*) of that which is unlawful is but evidence of a criminal intent;" but that, in the principal case, evidence had been offered in favour of the defendant, though, by the learned judge's directions to the jury, the whole of it had been removed from their consideration. That in *Lamb's* (*u*) case it was laid down, that every one who should be convicted of a libel must be the writer, contriver, or malicious publisher, knowing it to be a libel; that the knowledge there meant was not a mere knowledge of the contents, for that would make criminality depend upon the consciousness of an act, and not on the knowledge

(*t*) Lord Mansfield's doctrine in the cases of *Woodfall* and *Almon*. 5 Burr. 2661, 2686.

(*u*) 9 Co. 59.

of its quality, which would involve lunatics and children in all the penalties of criminal law.

Lord Mansfield, C. J. in delivering the judgment of the court, observed, "Four objections have been made; the first is peculiar to this case, namely, that evidence of a lawful excuse or justification was not left to the jury as a ground of acquittal. Upon every such defence there arise two questions—the one of law, the other of fact. Whether the fact alleged (supposing it true) be a lawful excuse, is a question of law; whether the allegation be true, is a question of fact; and according to this distinction, the judge ought to direct and the jury ought to follow his direction; though by means of a general verdict they are entrusted with the power of confounding the law and fact, and of following the prejudices of their affections and passions."

The learned judge then proceeded to comment upon the evidence offered by the defendant, which the court considered as rather aggravating his conduct than supplying a ground of defence to be left to the jury. His lordship then observed, "The second objection is, that the judge did not give his own opinion whether the writing was a libel, or seditious or criminal. The third, that the judge told the jury that they ought to leave the question upon the record to the court, if they had no doubt of the meaning and publi-

cation." That the answer to these objections is, that, by the constitution, the jury ought not to decide the question of law, whether such a writing of such a meaning, published without a lawful excuse, be criminal, and that they cannot decide it *against the defendant;* because, after a verdict, it remains open upon the record. That this is peculiar to the form of a prosecution for libel, that the question of law remains open for the court on the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases.

That no case had been cited of a special verdict in a prosecution for libel, leaving the question of law upon record to the court. That a criminal intent, from doing a thing in itself criminal without a lawful excuse, is an inference of law. That the practice objected to had continued ever since the revolution without opposition. That the fundamental definition of trials by jury, depends upon an universal maxim without an exception, *Ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices;* that where the questions can by the form of pleading be separated, the distinction is preserved upon the face of the record; but that when by the form of pleading the two questions are blended together, and cannot be separated

upon the face of the record, the distinction is preserved by the honesty of the jury. His lordship concluded by giving the judgment of the court, that the rule for a new trial should be discharged (*x*).

Lord Kenyon, C. J. adopted Lord Mansfield's doctrine in summing up to the jury in the case of the *King* v. *Withers* (*y*).

After this brief review of the principal decisions upon this interesting topic, little remains, but to quote the terms used by the legislature, when parliament deemed it proper to interfere and remove all doubt from this important subject.

In the statute 32 George III. c. 60. it is recited that doubts had arisen, whether, on the trial of an indictment or information for the making or publishing any libel, when an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same to give their verdict upon the whole matter in issue; and it is then *declared* and *enacted* that on every such trial the jury

(*x*) Mr. Erskine afterwards moved in arrest of judgment, and judgment was arrested, the court considering the indictment to be defective.

(*y*) 3 T. R. 428.

sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By the second section it is provided, "that on every such trial the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases." By the third section it is also provided, "that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases." And by the fourth section, "in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act, any

thing herein contained to the contrary notwithstanding."

It is observable, that the first clause in this statute is, so far as regards the giving a general verdict, merely *declaratory*, placing informations and indictments for libels on the same footing with those for any other offences. The latter branch is, in its terms, purely negative and restrictive, and, except that it amounts to a legislative disapproval of the directions which had been given to juries in particular instances, is rendered unimportant by the subsequent clause, which directs, affirmatively, what the court or judge *shall* do on such trials. This (the second) section provides, that the court or judge shall, according to their or his discretion, give their or his opinion on the matter in issue, in like manner as in other criminal cases. It is, therefore, observable, that the object of the legislature was to remove all anomalies and peculiarities by which trials for libels were distinguished from those for any other offences. Now, the principal peculiarity, and that on which the difference in practice originated, was this: that in the case of libel, the alleged libel was stated on the record, on which account it was unnecessary to decide at the trial upon the quality of the matter published. But, by the express provision of this clause, the jury

are to be directed *as in other criminal cases;* and in other criminal cases, the ordinary course is to advise and direct the jury as to the criminal quality of the transaction, supposing the facts to be proved. It seems, therefore, to follow, that the court or judge is bound to give an opinion on the legal quality of the alleged libel, as stated on the record, and the jury are not to convict without the previous sanction of the judge's opinion, that the act is criminal, though, in some instances, they had been required to convict, where they were satisfied as to the fact of publication and the truth of the averments. The opinion and direction to the jury is to be given *on the matter in issue;* by these terms it is not, it seems, to be understood that the court or judge is called upon to give any opinion or direction in the affirmative or negative upon the whole of the issue, but only, as in other cases, conditionally and hypothetically upon the law, as it arises on different branches of the evidence. As, whether if the facts be proved to the satisfaction of the jury, which the evidence tends to prove, they amount in law to a publication; whether the circumstances proved raise an absolute or qualified justification; whether, under these circumstances, proof of express malice be essential, or in the absence of any evidence of facts which can justify or excuse, the jury ought to infer malice

from the very act of publishing noxious and criminal matter. The third section seems to have been introduced merely for the purpose of repelling any inference which might otherwise have arisen from the terms of the first, that the jury were *bound* to give a general verdict. The fourth section seems to have been suggested by some apprehension, that, without an express clause to that effect, the defendant might be considered to be excluded from objecting that the alleged libel, as stated on the record, was not in itself illegal, and that the publishing of it was not criminal. As the second section provides, in effect, that the court or judge shall, at the trial, direct the jury as to the criminal quality of the alleged libel, and the jury were at their option to give a general verdict, it was probably deemed to be expedient to prevent, by an express enactment, all doubt on the question, whether such opinion and verdict were to be considered as final and conclusive. It seems, therefore, that the legislature meant to leave the question, whether the matter published amounted to a libel, as before, a question of law; the fourth clause expressly provides, that the defendant may still move in arrest of judgment, on such ground as he might have done before; and as, before the statute, the defendant might certainly have arrested the judgment on the ground that the matter published was not libellous, it seems

that no alteration was intended to be made in this respect, but that the objection, that the matter published was innoxious, as it stood on the record, was still available. But, whilst this is the case, it is obvious that the question must remain a question of law; a general acquittal would be conclusive, as in all other cases, but the finding of the jury, as to the mere criminal quality of the alleged libel, either by a general verdict of guilty or by a special verdict, must be immaterial, so long as the objection may be taken to the record itself, that it charges no libel in point of law, notwithstanding the finding of the jury in fact (z).

(z) See *R.* v. *Holt*, 5 T. R. 436. In the case of *R.* v. *Burdett*, 4 B. and A. 131, Best, J. observes, "It must not be supposed that the statute of George the Third made the question of libel a question of fact, if it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel, as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does, is to prevent the question from being left to the jury in the manner in which it was left before that time. Judges are, in express terms, directed to lay down the law, *as in other cases.* In all cases, the jury *may* find a general verdict; they do so in cases of murder and treason, but then the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And see 4 Bingh. 195.

CHAPTER XVII.

Of the Proceedings after the Trial.

THE court will not, after the defendant's conviction, make an order on the prosecutor to deposit the original libel with the officer of the court (*a*). After the defendant has been found guilty on a criminal information, it is a matter of course that he should stand committed, pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out upon bail (*b*).

The defendant cannot (*c*) move for a new trial after the first four days of the next term after conviction; but if it appear to the court that injustice has been done by the verdict, they will, *ex mero motu,* interfere after that period and grant a new trial.

The vice of one or more counts is no ground

(*a*) 2 East, 361. *R.* v. *Cator.*
(*b*) *R.* v. *Waddington,* 1 East, 143.
(*c*) 5 T. R. 436. 1 East, 145.

for arresting the judgment (*d*), provided there be one valid count in the information or indictment, though, as already seen, it is otherwise in a civil action, where general damages are given, since in the latter case the court cannot apportion the damages, and say how much was intended to be given in respect of the defective counts.

When the defendant is brought up for judgment, affidavits are produced either by the prosecutor or the defendant; and observations concerning them relate either to their contents or to the order in which they are read.

Where a defendant has been convicted, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial; in which case the defendant will (*e*) be at liberty to answer them.

And, where a defendant had (*f*) suffered judgment by default, the prosecutor was allowed to read affidavits in aggravation, containing expressions made use of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor having first made

(*d*) *R.* v. *Benfield and Sanders*, Burr. 980.
(*e*) *R.* v. *Sharpness*, 1 T. R. 228.
(*f*) *R.* v. *Archer*, 2 T. R. 204.

affidavit that an application had been made to both those persons to come forward with their testimony, which they had refused, and it appearing to the court that they were under control. But the court allowed the defendant and those persons time to come forward and answer the facts. And such evidence would be inadmissible, unless it appeared that the person refusing to give evidence was (*g*) under the control of the defendant.

To show the malice of the defendant, it is usual for the prosecutor to state upon his affidavit similar libels published since the conviction (*h*).

After judgment by default in a criminal prosecution, when the defendant is brought up for judgment, each party should come prepared with affidavits, stating his case; and if, in the course of the inquiry, the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day (*i*).

(*g*) *R.* v. *Pinkerton*, 2 East, 357.

(*h*) See *R.* v. *Withers*, 3 T. R. 432. Where Lord Kenyon, Chief Justice, said, "It is well settled that the conduct of the defendant, subsequent to his conviction, may be taken into consideration either by way of aggravating or mitigating the punishment; but the court will take care not to inflict a greater punishment than the principal offence will warrant." The same was ruled in the case of *R.* v. *Walter*.

(*i*) *R.* v. *Wilson*, 4 T. R. 487.

The defendant is, in general, at liberty to introduce any affidavit tending to show that his act did not result from pure malice, but proceeded from some motive less reprehensible; how far he should proceed in his statement is, of course, a matter of prudence and discretion to be exercised upon the particular circumstances of the case.

Any reflections upon the prosecutor beyond those conveyed by a bare statement of facts, and any attempt to impugn the credit of the witnesses, or the justice of the conviction, are inconsistent with the situation of the defendant, who stands before the court as a supplicant for its indulgence, and not in the character of an accuser.

It seems to be settled that a defendant is not at liberty to show, by affidavit, that a libel, imputing a criminal charge, was true, whether the party reflected on be or not be the prosecutor (*k*).

(*k*) *R.* v. *Halpin*, 9 B. and C. 65. In the case of the *King* v. *Roberts*, Mich. T. 8 G. 2. supra, v. 1, p. 232. Dig. L. L. 16. Selwyn's Nisi Prius, 1045, 7th edit. Holt's L. L. 273. Lord Hardwicke is reported to have intimated, that the truth of a libel might be shown in mitigation of punishment. It is, however, to be observed that, in the same case, the same learned judge is reported to have stated, that truth would be no justification in an action for a libel. The latter position is certainly incorrect, according to later authorities,

In the case of the *King* v. *Burdett* (*k*), where the libel imported that certain of the King's troops had maimed certain of the King's subjects, it was held that it was not competent to the defendant to use affidavits, after conviction, in mitigation of punishment, for the purpose of showing that the facts stated were true. But the libel purporting to have been written in consequence of the defendant's having read statements to that effect in different newspapers, an affidavit that he had read those statements in the newspapers, and that he had no doubt, in his own mind, that the statement was true, were allowed to be read.

In the above case, the parties to whom the criminal charge was imputed by the libel, were not the prosecutors, and some stress was laid on that circumstance by the court, in giving their judgment. In the late case of the *King* v. *Halpin* (*l*), such affidavits were excluded, although the party libelled was himself the prosecutor. But

although the point was formerly doubted. Supra, v. I, p. 232, 3.

In the case of the *King* v. *Draper*, (cited by Best, J. in the case of the *King* v. *Burdett*, 4 B. and A. 321.) the court received affidavits of the truth of the charge, but that was done by the consent of the prosecutor.—For other observations on this subject, see the Preliminary Discourse.

(*k*) 4 B. and A. 314.

(*l*) 9 B. & C. 65.

it was then also held, that though the defendant was not at liberty to show by affidavit that the charge was true, yet that he might disclose such circumstances as might induce the court to believe that he supposed them to be true when he published the libel (*m*).

General evidence, of good character, is always proper to be introduced into affidavits in mitigation.

It is not usual to give the defendant an opportunity of answering at a future day the affidavits produced by the prosecutor, where they do not extend beyond the allegations contained in the

(*m*) But in the case of the *King* v. *Baker*, Bull. N. P. 9. which was an information against the defendant for publishing a libel against Mr. Swinton, of Wadham College, Oxon. charging him with criminal practices, Lee, C. J. refused to let the defendant give evidence of his reasons for doing it, viz. that the supposed criminal accomplice told him so; for, he said, the only question was, whether the defendant was guilty of printing or publishing the libel, and that, though it were offered by way of mitigation only, yet, in fact, it amounts to a justification; and it has always been holden, that the matter of a libel cannot be given in evidence by way of justification, because, if the person charged with any crime be guilty, he ought to be proceeded against in a legal way, and not reflected on in this manner. And afterwards, (Tr. 13 and 14 G. 2.) the Court of King's Bench would not permit an affidavit of this matter to be read in mitigation of the fine, as they would not, on the report, receive any evidence of matter which did not appear at the trial.

indictment, though judgment should have been suffered by default (*n*). But where affidavits are produced to show a *continuation* of the defendant's malice, the court has thought it reasonable to allow the defendant an opportunity of answering them, since it cannot be supposed that he comes prepared to answer (*o*) that which is not contained in the indictment.

With respect to the order observed in reading affidavits:

When a defendant is brought up to receive judgment after conviction for a libel, his affidavits (*p*) are first read, and then the prosecutor's; after which, the defendant's counsel are first heard, and then the prosecutor's.

When the defendant is brought up on judgment by default, the prosecutor's affidavits are first read, and then the defendant's; after which the counsel for the prosecution are heard, and then the counsel for (*q*) the defendant.

Where there are no affidavits, the defendant's counsel always begin; where judgment is by default, and there are affidavits for the defendant,

(*n*) *R.* v. *Wilson*, 4 T. R. 487.

(*o*) Ib. and *R.* v. *Archer*, 2 T. R. 203.

(*p*) R. Mich. 29 G. 3. Tidd. Pr. 454, 4th edit. and *R.* v. *Bunts*, 2 T. R. 683.

(*q*) R. Mich. 29 G. 3. Tidd's Pr. 454. 2 T. R. 683.

but none for the prosecution, the defendant's counsel begin (*r*).

Of the punishment.

No offence seems to have been visited with punishments so varied in species and degree, as that which is the subject of the foregoing treatise; a striking proof how difficult it is to estimate its evil consequences, and of the different conceptions which, in different communities, have been entertained of their magnitude.

The history of foreign countries exhibits the penalties for this crime in every gradation, from the infliction (*s*) of death to the bleeding of the offending (*t*) organ; even in this it has been punished with very different degrees of severity; and the history of the Star Chamber records sentences upon libellers whose rigour can scarcely be exceeded: thus Wrennum, for traducing and scandalizing the Lord Chancellor Bacon, in a book delivered to the king, was sentenced by that

(*r*) *R.* v. *Finnerty*, Hil. T. 1811.

(*s*) Although the author of the Libellus Famosus was punishable capitally, qu. whether the offence was generally so punishable by the law of the Twelve Tables. See Prel. Dis.

(*t*) According to Sir E. Coke, the Lydians bled the slanderer in the tongue, and the listener in the ear, 12 R. 35. By the laws of Alfred, the "Publicum mendacium" was to be punished by the cutting out of the tongue, subject to redemption, juxta capitis æstimationem. Wilk. Leg. An. Sax. 41.

court to be *perpetually* imprisoned, to pay a fine of £1000, to be twice pilloried, and to lose both his ears. Leighton, for his publication, intituled "An Appeal to Parliament, or Sion's Plea against Prelacy," was sentenced to pay a fine of £10,000, to be whipt at the pillory twice, to lose both his ears, to have his nose slit and face branded, and to be imprisoned in the Fleet *during life* (*u*).

One of the earliest instances in which a libeller was sentenced to the pillory at common law, appears to have been that of Hugh Baker, who, in the fourth year of Elizabeth, was, for publishing a libel upon some of the inhabitants of Chertsey, sentenced to imprisonment, pillory, and to find security for his good (*x*) behaviour. Since that period, this mode of punishment at common law has not been unusual, but has seldom been inflicted in modern times, except in cases marked by some peculiar atrocity, and has generally been reserved for the more signal disgrace of those who have been convicted of disseminating profane or obscene libels. And now by the provisions of the late statute 56 G. 3. c. 138. this mode of punishment, in the case of libel, is

(*u*) 6 C. 1. 1631. See also the cases of *Prynne*, *Burton*, *Bastwick*, &c.

(*x*) 3 Ins. 220.

wholly excluded. As a misdemeanor, at common law, the offence is of course punishable by fine and imprisonment, at the discretion of the court, after a full consideration of all the circumstances, tending either to extenuate or aggravate the guilt of the offender. In addition to this, it is frequently deemed proper to impose upon the defendant the condition of finding security for his good behaviour, for a limited term, by which expedient the court are enabled to extend an humane indulgence to the offender, in respect of the duration of his imprisonment, without compromising their first and great duty to the public, the providing for its future security.

By the st. 60 G. 3. and 1 G. 4. c. 8. intituled An Act for the more effectual prevention of Blasphemous and Seditious Libels, provision is made for enabling the judge or court, after verdict or judgment by default, to order all copies of such libel in the possession of the defendant to be seized (*y*). By sec. 2. (*z*) such copies are

(*y*) "Whereas it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels, be it enacted that, from and after the passing of this act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel, tending to bring into hatred or contempt the person of his Majesty, his heirs, or successors, or the Regent, or the government and constitution of the United Kingdom as by law established, or

to be restored, in case the judgment be arrested or reversed. The fourth section (*a*) subjects a defendant, in respect of a second conviction, to such punishment as may be inflicted for high misdemeanors, or to banishment from the King's dominions.

either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means; it shall be lawful for the judge or the court, before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away, and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use: evidence upon oath having been previously given, to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and, in every such case, it shall be lawful for any justice of the peace, or for any constable or other peace officer, acting under any such order; or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever, belonging to the person against whom any such verdict or judgment shall have been had, or of any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be, and in case admission shall be refused or not obtained, within a reasonable time after it shall have been first demanded to

enter by force, by day, into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this act, or disposed of according to any further order relating thereto."

(z) Sect. 2. "That if, in any such case as aforesaid, judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error; all copies so seized shall be forthwith returned to the person or persons, from whom the same shall have been so taken as aforesaid, free from all charge and expence, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel; then all copies so seized shall be disposed of as the court in which such judgment shall be given, shall order and direct."

(a) Sect. 4. "And be it further enacted, that if any person shall, after the passing of this act, be legally convicted of having composed, printed, or published any blasphemous libel, or any such seditious libel as aforesaid, and shall after being so convicted offend a second time, and be thereof legally convicted before any commission of Oyer and Terminer, or goal delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanor, or to be banished from the united kingdom, and all other parts of his Majesty's dominions for such term of years as the court in which such conviction shall take place shall order."

Sect. 5. "And be it further enacted, that in case any person so sentenced and ordered to be banished as aforesaid, shall not depart from this united kingdom within 30 days after the pronouncing of such sentence and order as aforesaid, for the

purpose of going into such banishment as aforesaid, it shall and may be lawful to and for his Majesty to convey such person to such parts out of the dominions of his said Majesty, as his Majesty by and with the advice of his privy council shall direct."

Sect. 6. "And be it further enacted, that if any offender who shall be so ordered by any such court as aforesaid, to be banished in manner aforesaid, shall, after the end of 40 days from the time such sentence or order hath been pronounced, be at large within any part of the united kingdom, or any other part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall be so ordered to be banished as aforesaid, every such offender being so at large as aforesaid, being thereof lawfully convicted, shall be transported to such place as shall be appointed by his Majesty for any term not exceeding 14 years; and such offender may be tried before any Justice of Assize, Oyer and Terminer, Great Sessions, or Gaol Delivery, for the county, city, liberty, borough, or place, where such offender shall be apprehended and taken, or where he or she was sentenced to banishment; and the clerk of assize, clerk of the peace, or other clerk or officer of the court, having the custody of the records where such order of banishment shall have been made, shall, when thereunto required on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance, omitting the formal part of every indictment and conviction of such offender, and of the order for his or her banishment to the Justices of Assize, Oyer and Terminer, Great Sessions, or Gaol Delivery, where such offender shall be indicted; for which certificate six shillings and eight pence and no more shall be paid, and which certificate shall be sufficient proof of the conviction and order for banishment of any such offender."

By the 7th section, the certificate of the clerk of the peace, clerk of assize, or other officer of the court, having the custody of the records, &c. shall be sufficient proof of the conviction of such offender.

PRECEDENTS.

1. *Declaration by Bill in the King's Bench for Words of Felony.*

MIDDLESEX(*a*) TO WIT. A. B. the plaintiff(*b*) in this suit, complains of C. D(*c*) the defendant in this suit, being in the custody of the marshal of the Marshalsea of our Lord the now King before the King himself of a plea of trespass on the case, &c.

(A) For that whereas (*d*) the said plaintiff is a good, honest, true, and faithful subject of the realm, and as such hath always behaved and conducted himself, and until the committing of the grievances hereinafter mentioned was always reputed and esteemed to be a person of good name, fame, and credit, to wit, at, &c. (B) And whereas also the said plaintiff hath never been guilty(*e*) nor until the commission of the said grievances been suspected to have been guilty of the *felonies* (*or* misdemeanors, *as the case may be*) and offences hereinafter mentioned to have been charged upon and imputed to him the said plaintiff, or any other such crimes (*or* misdemeanors) or offences,

(*a*) The venue is transitory. See 1 T. R. 571, 647. Supra, vol. 1. 342. See also ib. as to a change of venue.

(*b*) As to the joinder of plaintiffs see vol. 1. 347.

(*c*) As to the joinder of defendants see vol. 1. 354.

(*d*) This general inducement of good character where the slander involves an imputation on character is usual but unnecessary, for the law presumes against misconduct until the contrary be duly proved; and see 1 Lev. 197. Styles, 218. Starkie on Evidence, tit. Presumption.

(*e*) This exculpatory averment though usual, does not seem to be essential, especially as the charge is afterwards alleged to have been *falsely* made: if it were truly made it lies on the defendant to allege and prove the truth. See 2 Wils. 147, supra, vol. 1. 434, 435.—*Hooker* v. *Tucker*, Holt's R. 39. *Bendish* v. *Lindsay*, 11 Mod. 194.

by means whereof he the said plaintiff, before the committing of the said grievances, had deservedly obtained the good opinion and credit of all the good and worthy subjects of the realm to whom he was known, to wit, at, &c. (C).

Yet *(f)* the said defendant well knowing the premises but contriving and *maliciously intending* (*g*) to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he was guilty of the felonies (*or* misdemeanours *as the case may be*) and offences hereinafter mentioned to have been imputed to him by the said defendant, and to subject him to the pains and penalties by law provided against persons guilty thereof, and to vex, harass, oppress, and ruin him the said plaintiff, heretofore to wit, on, &c. at, &c. (*h*) in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects (*i*)

(*f*) Where extrinsic averments are essential of facts in relation to which the words or libel are actionable, they are usually introduced immediately before this averment. See the next precedent.—As to the necessity for such averments see vol. 1, p. 391.

As to such averments great caution and discretion are requisite; to introduce extrinsic facts unnecessarily may be prejudicial either in imposing the burthen of unnecessary proof on the plaintiff, or in relieving the defendant from the allegation and proof of that which is essential to his defence. This is not all; it is often matter of policy, independent of the immediate object of the pleader, to set forth a good cause of action, to introduce allegations with the collateral view of allowing the plaintiff to go into evidence from which he would otherwise be excluded. It sometimes happens that extrinsic facts of little importance to the mere legal cause of action are of great importance with a view to the introduction of such evidence as is likely to influence a jury; care should, however, be taken to introduce other counts strictly confined to the legal and technical cause of action.

(*g*) As to the necessity for an averment of malice, see vol. 1, 433, and the authorities there cited.

(*h*) The precise day or place is not material.

(*i*) As to these allegations see vol. 1. p. 360. It seems to be sufficient to allege that the words were spoken in the presence of divers persons without alleging that those persons heard or understood the words, for that will be presumed till the contrary be shewn, vol. 1. 360. Secus, it seems, where the words were spoken in a foreign language. Ib. 361.

of the realm, of and concerning the said plaintiff (*k*) in the presence and hearing of the said last-mentioned subjects falsely and maliciously spoke and published (*l*) of and concerning the said plaintiff (*m*) the several false scandalous, malicious, and defamatory words (*n*) following, that is to say. He (*o*) (meaning the said plaintiff) is a thief. He (meaning the said plaintiff) stole a horse. I can prove him (meaning the said plaintiff) to be a thief; he (meaning the said plaintiff) ought to have been hanged many years ago (*p*).

2nd Count—For Words spoken to the Plaintiff.

AND for that whereas also the said defendant contriving and maliciously intending as aforesaid, afterwards, to wit, on, &c. at, &c. in a certain discourse which he the said defendant then and there had with the said plaintiff, in the presence and hearing of divers other good and worthy subjects of this realm, of and concerning the said plaintiff, falsely and maliciously spoke and published of and concerning the said plaintiff (*q*) in the presence and hearing of the said last-mentioned subjects, the several false, scandalous, malicious, and defamatory words following, that is to say, You (meaning the said plaintiff) are a thief (*r*). You (meaning the said plaintiff) stole a horse. You (mean-

(*k*) As to the necessity for a colloquium and its office, see vol. 1. 383.

(*l*) As to the necessity for this allegation, see vol. 1. 433, et seq.

(*m*) As to this allegation see vol. 1. 383, 384, where the words were spoken of a third person, this allegation is said to be necessary though a colloquium be laid, but where the words were spoken *to* the plaintiff himself, and there is an innuendo of the plaintiff, the omission of this allegation would not be material.—Ib.

(*n*) As to the necessity for stating the words correctly and the consequences of variance, see vol. 1. 369, et seq.

(*o*) As to the nature and office of an innuendo, see vol. 1. 418.

(*p*) Where the words themselves manifestly import a charge of a specific crime, it is unnecessary to introduce any innuendo as to their meaning, see vol. 1. 428, 9, *Peake* v. *Oldham*, Com. 275. But such an innuendo that the defendant thereby meant to charge the specific offence of murder or larciny, would not vitiate the declaration where such an intention could be collected from the words.—Ib.

(*q*) Supra note (i) and vol. 1, p. 360. Where the words were spoken *to* the plaintiff himself, a colloquium and innuendo are sufficient without this further averment.

(*r*) As to the actionable meaning of the terms, see vol. 1, p. 99.

ing the said plaintiff) ought to be hanged. I can prove you (meaning the said plaintiff) a thief, and it is in my power to hang you (meaning the said plaintiff). Whereby the said plaintiff hath been and is greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of the realm, insomuch that divers of those neighbours and subjects have on occasion of the committing of the said grievances from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be guilty of the felonies (*or* misdemeanors *as the case may be*) and offences hereinbefore mentioned to have been imputed to the said plaintiff, and have from thence hitherto by reason thereof wholly refused and still do refuse to have any dealing or communication with him the said plaintiff; and the said plaintiff hath been and is, by reason of the premises, greatly injured and damnified (*r*), to wit, at, &c.

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2. Declaration against C. D. for charging A. B. with Perjury in giving Evidence on the Trial of a Cause.

State the general inducement of good character as in Precedent 1. *from (A) to (C) and then proceed as follows:*

And whereas a certain issue (*or* certain issues *according to the fact*) joined between E. F. and G. H. in a plea of —— in the court of our said Lord the King before the King himself, to wit, at Westminster, was (*or* were) duly tried at the assizes held in and for the county of —— at —— in the said county of —— on, &c. by a certain jury of that county, in that behalf, before ———— the Justices of our said Lord the King assigned to take the assizes in the said county of

(*r*) Where the plaintiff has suffered any special damage, &c. in respect of which he claims compensation, it ought to be specially alleged, see vol. 1. 489.

——— (*s*). And the said A. B. at the said trial was then and there duly sworn before the said Justices at the said assizes, and was then and there examined and gave his evidence as a witness upon the said trial (*t*), yet the said C. D. well knowing the premises but contriving and maliciously intending to injure the said A. B. in his said good name, fame, and character, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he was guilty of perjury, and to subject him to the pains and penalties by law provided against persons guilty thereof, and to vex, harass, oppress, and ruin him the said plaintiff, heretofore to wit, on, &c. at, &c. in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects of the realm, of and concerning the said A. B., and of and concerning (*u*) the trial of the said issue (or issues), and the said evidence so as aforesaid given by the said A. B. at and upon the said trial, he the said C. D. then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said A. B., and the said trial, and the said evidence so given by the said A. B. on the said trial, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said A. B.) forswore himself at the trial of that cause (meaning at the said trial abovementioned).

2nd Count.—And for that the said C. D. contriving and intending as aforesaid, afterwards to wit, on, &c. at, &c. in a certain other discourse which he the said C. D. then and there had in the presence and hearing of divers other good and worthy subjects of this realm, of and concerning the said A. B., and of and concerning the said trial, falsely and maliciously spoke

(*s*) It would be sufficient to aver more concisely that at the assizes held on, &c. at, &c. in and for the county of ——, a certain cause came on to be tried before a jury in that behalf duly taken, wherein one M. N. was the plaintiff, and one O. P. the defendant.

(*t*) See in general as to the necessity for a mode of alleging extrinsic facts, vol. 1, p. 391.

(*u*) As to the necessity for this averment, see vol. 1, p. 412.

and published, in the presence and hearing of the said last-mentioned subjects, the several other false, scandalous, malicious, and defamatory words following, of and concerning the said A.B., and of and concerning the said trial, and of and concerning the said evidence, so as aforesaid, given by the said A. B. on the said trial, that is to say, He (meaning the said A. B.) forswore himself at ——— (meaning at the said trial of the said issue).

Conclude as in Precedent 1.

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3. *For Words imputing Dishonesty to a Tradesman* (*x*).

(General inducement of good character as in Precedent 1. *from (A) to (B) and then as follows:)*

And whereas also the said plaintiff before and at the time of the committing of the said grievances, and from thence hitherto, hath used and exercised and still uses and exercises the trade and business of a tailor (*y*), and hath always conducted himself, and still continues to conduct himself with honesty and integrity in his said trade or business, to wit, at, &c., and hath never been guilty, nor until the committing of the said grievances been suspected to have been guilty of any cheating, fraud, or dishonesty in his said trade or business, or otherwise. By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence, and credit of all his neighbours, and other good and worthy subjects of the realm to whom he was in any wise known, but had acquired and was still continuing to acquire in his said trade or business divers great profits and emoluments, for his maintenance and support, to wit, at, &c. Yet the said defendant, well knowing the premises, but contriving

(*x*) See in general as to words actionable in respect of special character, vol. 1, p. 117.

(*y*) Supra, vol. 1, p. 117; and in general as to the mode of alleging the plaintiff's special character, see vol. 1, p. 400.

and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and in his said trade or business, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he the said plaintiff was guilty of fraud and dishonesty, and of cheating and imposing on his customers in his said trade or business, and to oppress and ruin him the said plaintiff, heretofore, to wit, on, &c. at, &c., in a certain discourse which he the said defendant then and there had of and concerning the said plaintiff in his said trade or business (*z*), in the presence and hearing of divers good and worthy subjects of the realm, falsely and maliciously spoke and published of and concerning the said plaintiff, in his said trade or business, in the presence and hearing of the last-mentioned subjects, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) *(set out the words with innuendos (a).)* By means whereof he the said plaintiff hath been and is greatly injured in his aforesaid good name and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects have by reason of the committing of the said grievances from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be guilty of fraud and dishonesty in his said trade or business, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his said trade or business or otherwise; and the said plaintiff hath been and is greatly injured and damnified in his said trade and business and otherwise, and in particular by reason of the premises A. B., C. D., and E. F., who before the committing of the said grievances had been and were customers and employers of the said plaintiff in his said trade or business, not knowing the innocence of the said plaintiff in the premises, have by reason of the committing of the said grievances suspected the said plaintiff

(*z*) As to the necessity for this averment, see vol. 1, p. 213.
(*a*) See vol. 1, p. 418.

to have been guilty of fraud and dishonesty in his said trade or business, and have wholly refused further to retain or employ the said plaintiff, or to have any further dealing with him in his said trade or business, as but for the committing of the said grievances they otherwise would have done (*a*), to wit, at, &c.

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4. *For Words of Insolvency spoken of a Tradesman* (*b*).

(State the general inducement of good character as in Precedent 1. *from (A) to (B), then proceed.)*

And whereas also the said plaintiff before and at the time of the committing of the said grievances, and from thence hitherto hath used and exercised, and still uses and exercises the trade or business of a *silversmith (according to the fact)* and has always used and exercised, and still uses and exercises his said trade or business with integrity and punctuality, and hath always well and truly paid and discharged all his just debts and obligations, and hath not been, nor is, nor until the committing of the said grievances been suspected to be, either unable or unwilling duly and faithfully to pay and discharge all such debts and obligations, to wit, at, &c. By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence, and credit of all his neighbours and other good and worthy subjects of the realm to whom he was in any wise known, but had acquired, and was still continuing to acquire in his said trade or business divers large profits and emoluments, to wit, at, &c. Yet the said defendant well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and

(*a*) As to the averment of damage and the necessity for averring special damage, see vol. 1, p. 439.

(*b*) See in general as to words of insolvency, vol. 1, p. 127-8.

believed that he the said plaintiff was in poor and indigent circumstances, and incapable of paying and discharging his just debts and obligations, and to oppress and ruin him the said plaintiff, heretofore, to wit, on, &c., at, &c., in a certain discourse which he the said defendant then and there had of and concerning the said plaintiff in his said trade or business, falsely and maliciously spoke and published of and concerning the said plaintiff, in his said trade or business, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) owes more money than he is worth. He (meaning the said plaintiff) is run away. He (meaning the said plaintiff) is broke. By means whereof he the said plaintiff hath been, and is greatly injured in his aforesaid good name and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of the realm, insomuch that divers of those neighbours and subjects have, by reason of the committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be insolvent and incapable of paying and discharging his just debts, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his trade or otherwise; and the said plaintiff hath been and is greatly injured and damnified in his said trade and business and otherwise, to wit, at &c.

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5. *For a Libel against an Attorney.*

(General inducement of good character as in Precedent 1. *from (A) to (B) and then as follows.)*

And for that whereas also the said A. B. for a long time before the composing and publishing of the false, scandalous, malicious, and defamatory libel by the said C. D. hereinafter mentioned, had been, and was, and still is an attorney (*c*) of the court of our said Lord the

(*c*) As to the allegation of special character, see vol. 1, p. 400.

King before the King himself, and also a solicitor of the high court of Chancery, and had used, exercised, and carried on the profession and business of an attorney and solicitor, with great credit and reputation, and had acquired and was still continuing to acquire divers large gains and profits in his said profession and business, to wit, at, &c. and whereas also the said A. B. and one E. F. another of the attornies of the court of our said Lord the King before the King himself, and also a solicitor of the said high court of Chancery, had, as such attornies and solicitors, been concerned in the prosecution of a certain commission of bankruptcy against the said C. D., and in divers proceedings and disputes concerning his estate and effects, and had always behaved and conducted themselves therein with skill, care, judgment, and integrity, to wit, at, &c. aforesaid. Yet the said C. D., well knowing the premises, but contriving, and falsely and fraudulently intending, to injure the said A. B. in his credit and reputation aforesaid, and also in his said profession and business of attorney and solicitor as aforesaid, and to cause it to be suspected and believed that he the said A. B. had conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy proceedings and disputes, and to vex, harass, oppress, impoverish, and wholly ruin him the said A. B., heretofore, to wit, on, &c., at, &c., wrongfully, maliciously, and injuriously composed, wrote, and published, and caused to be composed, written, and published (*d*), a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. and E. F., in the way of, and in respect to their profession and buness of attornies and solicitors, and of and concerning their prosecution of the said commission as such attornies and solicitors, and their conduct as such attornies and solicitors in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankrupt, in the form of, and as a letter addressed to, &c., in which said letter was and is contained, amongst other things, the false, scandal-

(*d*) As to the averment of publication, vide supra, vol. 1, p. 358.

ous, defamatory, and libellous words and matters following, of and concerning the said A. B. and E. F. in the way of and in respect to their profession and business of attornies and solicitors, and of and concerning their prosecution of the said commission as such attornies and solicitors, and their conduct as such attornies and solicitors, in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankrupt. *(Here set out the letter verbatim, with appropriate innuendos.)* By means of the composing, writing, and publishing of which said false, scandalous, malicious, and defamatory libel by the said C. D. as aforesaid, the said A. B. hath been, and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy, and disgrace, and hath been and is suspected to have acted dishonestly and unskilfully in the way of his said business and profession of an attorney and solicitor and to have conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy proceedings and disputes, and has been greatly vexed, harassed, oppressed, and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him in his said profession and business, and hath been, and is otherwise much injured and damnified therein, to wit, at, &c., to the damage, &c.

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6. *For Words imputing Ignorance and Unskilful Treatment of a Patient to an Apothecary.*

(General inducement of good character as in Precedent 1. *from (A) to (B) and then as follows:)*

And whereas the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned, practised and exercised, and still continues to practise and exercise the art or business of an apothecary (*e*), and hath always conducted himself, and still

(*e*) See vol. 1, p. 400.

continues to conduct himself in the practice of his said art or business with great skill, care, and humanity, in preparing, administering, and applying wholesome and proper medicines for healing and curing divers subjects of this realm of many diseases and disorders under which they respectively laboured, by means whereof the said plaintiff, before the committing of the said grievances, had deservedly obtained and acquired the good opinion, esteem, and confidence of all his neighbours and other good and worthy subjects of the realm to whom he was in any wise known, and had acquired, and was still continuing to acquire divers great gains and profits by the practice of his said art or business, to wit, at, &c. And whereas also (*f*) the said plaintiff whilst he so practised and exercised his said art or business, and before the committing of the said grievances, to wit, on, &c., at, &c., was sent for as such apothecary to attend and visit in the way of his said art or business the child of one E. F., which then was sick, and which before the committing of the said grievances died, and during his attendance on the said child, he the said plaintiff prepared and administered to the said child wholesome and proper medicines, according to the nature of the disorder of the said child, to wit, at, &c. Nevertheless the said defendant, well knowing the premises, but contriving and maliciously intending to prejudice and injure the said plaintiff in his good name, fame, credit, and esteem, in his aforesaid art or business, and to cause the said plaintiff to be brought into public scandal, infamy, and disgrace, and reputed to be a person ignorant in his said art or business, on, &c. at, &c., in a certain discourse which the said defendant then and there had with divers subjects of this realm, of and concerning the said plaintiff, in his aforesaid art or business, and his attendance on the said child, and of and concerning the medicines and remedies which the said John had prepared for, and administered to the said child, the said defendant falsely and maliciously in the presence and hearing of those subjects,

(*f*) See in general as to the necessity for a mode of alleging extrinsic facts, vol. 1, p. 391.

spoke, proclaimed, and published, of and concerning the said plaintiff in his said art or business, and of and concerning his said attendance on the said child, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) has a great deal to answer for; but for his (meaning the said plaintiff's) ignorance, (meaning ignorance in his said art or business) that child (meaning the said child whom the said plaintiff as such apothecary had attended, and to whom he had administered as aforesaid) would still have been living. His (meaning the said plaintiff's) medicines did the business.

2nd Count.—For the Words, — the medicine which he sent (meaning the medicine administered by the said plaintiff, as such apothecary, to the said child of the said E. F.) *was no better than poison.*

By means whereof the said plaintiff is much prejudiced, injured, and degraded in his good name, fame, credit, and reputation, and is fallen into public scandal and disgrace, and reputed to be a person ignorant in his said art or business of an apothecary, and divers of his friends and neighbours and other good and worthy subjects of the realm, have by reason of the committing of the said grievances, refused, and still do refuse to employ the said plaintiff in his aforesaid art or business of an apothecary as before they were used to do, and otherwise would have done, to the damage, &c.

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7. *For Written Slander in giving the Character of a Servant.*

(General inducement as in Precedent 1. *from (A) to (B) and then as follows:)*

And for that whereas the said A. B. before the committing of the grievances hereinafter mentioned, had been retained and employed by and in the service of the said C. D. as his butler and servant, and in that capacity had behaved with due integrity,

good temper, activity, and civility, and never was, or until the time of the committing of such grievances, suspected to have been, or to be bad tempered, lazy, or impertinent, by means of which said several premises he the said A. B. before the committing of the said several grievances had not only deservedly obtained the good opinion of all his neighbours, and divers other good and worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself by his honest, faithful, diligent, and attentive exertions in the service of his masters and employers, had not such grievances been committed as hereinafter mentioned, to wit, at, &c. And whereas the said A. B. before and at the time of the committing of such grievances, had quitted and left the service of the said C. D., and had been recommended to, and was likely to be retained and employed by and in the service of one E. F., as a footman, for certain wages to be therefore paid to him the said A. B., to wit, at, &c. Yet the said C. D., well knowing the premises, but contriving and maliciously intending to injure the said A. B. in his said character, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, and particularly with the said E. F., and to cause it to be suspected and believed that the said A. B. was not fit to be employed as a servant, and that he was bad-tempered, and a lazy and impertinent fellow, and thereby to prevent the said E. F. from retaining and employing him the said A. B. in his service as he otherwise might and would have done, and to vex, harass, oppress, impoverish, and wholly ruin him the said A. B., and to deprive him of the means of supporting himself by honest and industrious means heretofore, to wit, on, &c., at, &c., aforesaid, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. as such servant, containing, amongst other things, the several false, scandalous, malicious, and defamatory words and matters following, of and concerning the said A. B., as such servant, that is to say, He (meaning the said

A. B.) is a bad-tempered, lazy, impertinent fellow, (thereby then and there meaning that the said A. B. was not a person fit to be retained and employed in the capacity of a servant).

2nd Count.—And the said A. B. further says that the said C. D. further contriving and intending to injure and damnify the said A. B. as aforesaid, afterwards, to wit, on, &c., at, &c. falsely, wickedly, maliciously, wrongfully, and unjustly, did publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. as such servant as aforesaid, containing the several false, scandalous, malicious, and defamatory words and matters following, of and concerning the said A. B., as such servant as aforesaid, that is to say, He (meaning the said A. B.) is a bad tempered, lazy, and impertinent fellow,) by means of the committing of which said grievances the said A. B. hath been and is greatly injured in his said good character, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known, insomuch that divers of those neighbours and subjects, and in particular the said E. F., to whom the good temper, fidelity, activity, and civility of the said A. B., in the capacity of a servant or otherwise were unknown, have on occasion of the committing of the said grievances, from thence hitherto, suspected and believed, and the said E. F. still doth suspect and believe the said A. B. to have been and to be a bad-tempered, lazy, and impertinent person, and unfit to be retained or employed in the capacity of a servant, and also by reason thereof the said E. F. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, refused and declined to retain and employ the said A. B. in his service as a footman or otherwise, as he otherwise might and would have done, and by reason thereof he the said A. B. hath not only lost and been deprived of the support, sustenance, wages, gains, and emoluments which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as last aforesaid, but hath from

thence hitherto remained and continued, and still is out of employ, deprived of the opportunity of supporting himself by honest and industrious means, and hath been and is, by means of the said several premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid, to the damage, &c.

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8. *Declaration for Words spoken of a Magistrate in his Office* (s).

(General averment of good character as in Precedent 1. *from (A) to (B)*

And whereas also the said plaintiff before and at the time of the committing of the said grievances by the said defendant was, and from thence hitherto hath been, and still is one of the Justices of our Lord the King assigned to keep the peace of our said Lord the King, in and for the county of ——— and also to hear and determine divers felonies and other misdemeanors committed in the said county, and during all that time governed and conducted himself in his said office with justice, uprightness, and integrity, to wit, at, &c. Yet the said defendant well knowing the premises, but contriving and wrongfully and maliciously intending to injure, prejudice, and aggrieve him the said plaintiff, so being such justice as aforesaid, and to cause it to be suspected and believed that he, the said plaintiff, had acted unjustly and corruptly in his said office of justice of the peace, heretofore, to wit, on, &c., at, &c., in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good worthy subjects of the realm, of and concerning him the said plaintiff in his said office of justice, falsely and maliciously spoke and published of and concerning the said plaintiff in his said office, the several false, scandalous, malicious, and defamatory words following, that is to say, He *(set out the words with proper innuendos.)*

(s) As to the right to maintain this species of action, see vol. 1, 117.

By means whereof the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his said office, and in his good name, fame, and reputation, and divers of the good and worthy subjects of the realm have suspected and believed, and still do suspect and believe that the said plaintiff hath behaved and demeaned himself dishonestly and corruptly in his said office, and the said plaintiff hath been and is brought into public contempt, infamy, and disgrace, and hath been and is otherwise greatly injured and damnified, to wit, at, &c.

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9. *For Words imputing Incontinence to an unmarried Woman, which occasioned special damage (t).*

(General inducement of good character as in Precedent 1. *from (A) to (B)*

And for that whereas also the said plaintiff hath always been a virtuous, modest, and chaste subject, and until the committing of the grievances hereinafter mentioned had always been esteemed to be of unblemished reputation, and that before and at the time of the committing of the said grievances, she the said plaintiff enjoyed the society and conversation, friendship and countenance of many worthy and estimable subjects of this realm, to wit, of A. B., C. D., &c. (*naming them*) and divers others, and lived and associated with them on terms of mutual respect, confidence, and intimacy, and was by divers of those persons (*naming them*) received and entertained in their respective houses, and found and provided by them respectively with meat and drink gratuitously, and without any price or sum of money whatsoever, by her paid or payable for the same, to the great reduction of her necessary expenses, of living and maintaining herself, and the great increase of her riches, to wit, at, &c. Yet that the said defendant, well knowing the premises, and envying the

(*t*) See the case of *Moore* v. *Meagher*, in error. Supra, vol. 1. 202. 1. Taunt. 39, where it was held that such a declaration was good, and the plaintiff below had judgment.

happiness of the said plaintiff, and maliciously contriving and intending to injure and ruin her in her character, and to deprive her of the good will, society, conversation, friendship, and commerce of all her friends, relations, and acquaintances, and to impoverish her, and deprive her of all the benefits and advantages of her fortune and pecuniary circumstances, so by her received and receivable as aforesaid, heretofore, to wit, on, &c., at, &c., in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects of this realm, of and concerning the said plaintiff, in the presence and hearing of the said last mentioned subjects, falsely and maliciously spoke and published, of and concerning the said plaintiff, the several false, scandalous, malicious, and defamatory words following, that is to say, *(set out the words imputing incontinence to the plaintiff, with innuendos.)* By means of the speaking of which several false, scandalous, malicious, and defamatory words, the said plaintiff hath been, and is greatly injured in her credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst all her neighbours and other good and worthy subjects of the realm, insomuch that the said last mentioned neighbours, subjects, and friends, especially the several persons hereinbefore in that behalf named, to wit, the said A. B., C. D., &c. (*u*), have, by reason of the committing of the said grievances, refused to hold or permit any intercourse or society with her, or to receive, or to admit her into their respective houses or company, or to find or provide for her, meat, drink, or any other benefits and advantages, in any manner whatsoever, as they before that time had done, and otherwise would have continued to do, whereby the plaintiff hath lost all those valuable benefits and advantages, being to her theretofore of great value, to wit, of the value of 100*l.*, and hath been and is greatly reduced and prejudiced in her fortunes and pecuniary circumstances, and obliged to incur a much greater expense in her necessary living

(*u*) As to the necessity of stating the names, see vol. 1. p. 441, 442. B. N. P. 7. *Hartley* v. *Herring*, 8 T. R. 140.

and supporting herself, to wit, the annual amount of 100*l.*, than she theretofore had done, and otherwise would have continued to do, and hath been, and is by means of the premises, greatly damnified and impoverished, to wit, at, &c.

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10. *Declaration for composing, printing, and publishing a Libel.*

For that whereas the said plaintiff is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. And whereas he the said plaintiff hath never been guilty, nor until the time of the committing of the said grievances as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct hereinafter mentioned to have been imputed to him, or of any such offences or misconduct. By means of which said several premises, he the said plaintiff, before the committing of the said grievances hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other good and worthy subjects of this realm to whom he was known, to wit, at, &c. (*x*). Yet the said defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by

(*x*) It is usual to introduce in this part of the declaration, by way of further inducement, such extrinsic facts, the averment of which is essential to the cause of action. As to such averments, see vol. 1. 391, et seq.

those neighbours and subjects that he the said plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him the said plaintiff, on, &c. at, &c. aforesaid, falsely, wickedly, and maliciously did compose (*y*), print (*z*), and publish, and cause (*a*) and procure to be printed and published, of and concerning the said A. B., a certain false, scandalous, malicious, and defamatory libel, containing amongst other things (*if part only be set out*) in one part thereof, the false, scandalous, malicious, and defamatory words and matters following (*b*), of and concerning (*c*) the said plaintiff, that is to say, (*setting out the libellous passage with apt innuendos,*) and also containing in another part thereof, the several other false, scandalous, malicious, and defamatory words and matters following, of and concerning the said plaintiff, that is to say, (*setting out another libellous passage with apt innuendos,*) and also containing in another part thereof the several other false, scandalous, malicious, and defamatory words and matters following, of and concerning the said plaintiff, that is to say, (*setting out another libellous passage with apt innuendos.*)

(*y*) The plaintiff on such a count may have a verdict for the publishing, though no proof be given of the composing, writing, or printing, see vol. 2, p. 50, and Starkie on Evidence, tit. Libel. Variance.

(*z*) If the libel has been published in a public newspaper, it is usual to aver that the defendant did *compose, print, and publish in a certain public newspeper*, &c., and not unfrequently the title of the newspaper is set out; it seems, however, to be sufficient to allege a printing and publishing simply, and danger of variance may be incurred in setting forth the title of the newspaper.

(*a*) Where the libel is in writing, it is usual to allege as follows:—did *compose, write, and publish, and cause and procure to be written and published, of and concerning*, &c., *a false, scandalous, malicious, and defamatory libel*, &c., and sometimes it is added, in the form of a letter to the plaintiff, &c., but it does not appear to be necessary that the particular mode or form of writing or publishing should be set out.

This allegation, *and cause*, &c. though usual, is wholly superfluous; for in legal consideration a man does that which he causes to be done; an allegation in the disjunctive would render the declaration demurrable.—Supra, vol. 1. 361.

(*b*) As to the statement of the libel, see vol. 1. 366, &c.

(*c*) As to the nesessity of this allegation, in order to connect the libel with the plaintiff, and such extrinsic facts as are previously stated, see vol. 1. 412, et seq.

(Where there is any doubt as to the meaning or application of the libellous matter, it is usual to add other counts, with suitable variances as to such allegations.)

By means of the committing of which said several grievances the said plaintiff hath been and is greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known, insomuch that divers of those neighbours and subjects, to whom the innocence of the said plaintiff was unknown, have, on occasion of the committing of the said several grievances by the said defendant, from thence hitherto suspected and believed, and still do suspect and believe the said A. B. to have been guilty of the offences and improper conduct imputed to him as aforesaid, and have by reason of the committing of the said several grievances by the said C. D., from thence hitherto refused, and still do refuse to have any acquaintance, intercourse, or discourse with the said plaintiff, and the said plaintiff hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c., to the damage, &c.

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11. *Declaration for a malicious Prosecution of a Charge of Felony before a Magistrate, and afterwards by Indictment at the Sessions, where the Grand Jury found no True Bill.*

(General inducement of good character, supra, Precedent 1. *from (A) to (C), and then proceed.)*

YET the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause him to be imprisoned and unjustly punished, and to impoverish, oppress, and wholly ruin him, heretofore, to wit, on, &c., at, &c., falsely and maliciously, and without any reasonable and probable cause

whatever, alleged and objected against the said plaintiff, that he the said plaintiff had before then feloniously stolen, taken, and carried away, *(state the particulars)* of him the said defendant; and then and there, and for the said supposed offence, falsely and maliciously, and without any reasonable or probable cause, arrested, and caused, and procured the said plaintiff to be arrested by his body, and carried and conveyed him, and caused and procured him to be carried and conveyed in custody before one M. N., Esq., then, and still being one of the Justices of our Lord the King, in and for the said county of ———, and also to hear and determine divers felonies and trespasses, and other misdemeanors committed within the said county, and to be examined by and before the said M. N., so being such Justice as aforesaid, of, upon, and for the said supposed offence, and then and there, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said M. N., so being such Justice as aforesaid, to commit the said plaintiff into the custody of the keeper of a certain prison of our said Lord the King, in the said county, to wit, a certain prison of our said Lord the King, called ——, and to make out and grant, under his hand and seal, as such Justice as aforesaid, a certain warrant or mandate, directed to the said keeper of the aforesaid prison, or his deputy, bearing date, on, &c., whereby the said Justice commanded (*f*), authorized, and required the said keeper of the said prison, or his deputy, to receive into his custody the body of the said plaintiff, for further examination as to the said offence imputed to and

(*f*) This of course should be according to the fact. It does not appear to be necessary to set out the particulars of such warrant to detain the prisoner for further examination; it would, it seems, be sufficient to aver that the defendant maliciously, and without any reasonable or probable cause, caused and procured the said Justice to order that the said plaintiff should be detained and confined in a certain prison there, in order to his further examination as to the said supposed offence, so imposed and charged on him the said plaintiff, as aforesaid, and maliciously, and without any reasonable or probable cause, caused and procured the said plaintiff to be kept and detained in the said prison there for a long space of time, to wit, for the space of —— days, and afterwards, to wit, on, &c., at, &c.

charged upon him the said plaintiff as aforesaid, on Thursday morning then next, at ten of the clock, and him safely keep in his custody until he should thence be discharged by due course of law, to wit, at, &c. aforesaid; and that the said defendant also then and there maliciously, and without any reasonable or probable cause, caused and procured the said plaintiff to be kept and detained in custody, in the aforesaid prison of our said Lord the King, under and by virtue of the aforesaid warrant or mandate, from thence until and upon, &c., and during that time, and afterwards, on, &c. aforesaid, at, &c., and before the aforesaid Justice, falsely and maliciously, and without any reasonable or probable cause whatever, again alleged and complained against him the said plaintiff, that he the said plaintiff had before then feloniously taken and carried away, *(set out the particulars)* of him the said defendant, and then and there falsely and maliciously and without any reasonable or probable cause whatever, caused and procured the said M. N. so being such Justice, to make and grant a certain other warrant, under his hand and seal as such Justice as aforesaid, bearing date, &c., and directed to the aforesaid keeper of the said prison, called ———, or his deputy, whereby he the said Justice commanded (*g*), and required, and authorised the said keeper, or his deputy, to detain in his custody the body of the said plaintiff so charged and accused before him the said Justice as last aforesaid, and him safely keep in his custody until he should be discharged by due course of law; and that the said defendant did then and there falsely and maliciously, without any reasonable or probable cause whatever, cause and procure the said plaintiff to be detained and kept in custody, as well in the said prison called ——, as aforesaid, as in a certain other prison of our said Lord the now King, called ——, under, and by virtue, and in consequence of the said last-mentioned warrant or mandate, for a long space of time, and until his discharge hereafter mentioned, to wit, at, &c. aforesaid. And the said plaintiff, in fact, further saith, that whilst

(*g*) This of course must be stated according to the warrant itself which must be produced and proved.

he the said plaintiff was so in custody as aforesaid, to wit, at (*h*) the general quarter session of the peace of (*i*) our said Lord the King, holden in and for the county of ——, at ——, on, &c. before A. B., Esq., &c., and others their fellows Justices of our said Lord the King, assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, falsely and maliciously, and without any reasonable or probable cause whatever, preferred, and presented, and caused to be preferred and presented to the jurors of the Grand Inquest then and there, to wit, at the said sessions, sworn and charged to inquire for our Lord the King, and the body of the said county of ———, a certain bill (*k*) (of indictment) against the said plaintiff, by the name and description of, &c., charging, and accusing, and purporting, that the said plaintiff, on, &c. *(set out the substance of the charge)* (*l*), with the intent that the same should then and there be found a true bill by the said jurors, which said bill the said jurors of the said Grand Inquest did then and there return into the said court of the said session so holden as aforesaid, not found (*m*), whereupon the

(*h*) It seems to be now settled that a defect in the jurisdiction of the court, or in the indictment, will not preclude the plaintiff from maintaining his action, and, therefore, no averment as to the competency of the court is necessary.—Supra, vol. 1. 446. 2 Wils. 102. Com. Dig. Action on the case for a conspiracy, c. 4. Rol. Ab. Action Sur Case, 50. 4 T. R. 247. 2 Str. 691. 1 Salk. 15.

(*i*) As to the setting out the style of the court, see vol. 1. 446.

(*k*) Until a bill is found by the Grand Jury, it is a bill and not an indictment, and ought in strictness to be so described, vide supra, vol. 1. 445. Com. Dig. Ind. B. 5 Taunt. 187. 1 Salk. 376. But it is not unusual, where a bill has been found, to allege that the defendant "indicted, and caused and procured to be indicted, the said plaintiff." See 2 Burr. 993.

(*l*) As to setting forth cumulative charges, see vol. 1. 446. It is sufficient to prove that any one of the charges in the bill of indictment was maliciously preferred, see vol. 1. 446. *Reed* v. *Taylor*, 4 Taunt. 616. The charge should be set out in substance only, supra, vol. 1, 447. As to the degree of particularity and accuracy with which this should be done, see vol. 1. 447.

(*m*) The declaration must shew that the prosecution was determined, supra, vol. 1. 449, 450. The allegation that the Grand Jury threw out the bill serves sufficiently to shew a determination.—2 T. R. 232. Supra, vol. 1. 451.

said plaintiff was then and there discharged from and out of custody, and the said prosecution and complaint against him the said plaintiff then and there became and were abandoned by the said defendant, and wholly ended and determined.

2nd Count.—And the said plaintiff in fact further saith, that the said defendant, further contriving and intending as aforesaid, at the aforesaid general quarter sessions of the peace, holden in and for the county of ———, at, &c., on, &c., before, &c. and others their fellows Justices of our said Lord the King, assigned to keep the peace, &c., and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, falsely and maliciously, and without any reasonable or probable cause whatever, preferred and prosecuted, and caused to be preferred and presented to the jurors of the Grand Inquest then and there, to wit, at the said sessions, sworn and charged to inquire for our said Lord the King and the body of the said county, a certain other bill of indictment against the said plaintiff, by the name, &c., of, &c., charging, accusing, and purporting, that the said plaintiff, on the aforesaid day, &c., feloniously stole, *(set out the particulars)* of the said defendant, which last-mentioned bill of indictment the jurors of the said Grand Inquest did then and there return into the said court of the said session so holden as aforesaid, not found (*n*).

3rd Count.—And for that whereas the said defendant further contriving and intending as aforesaid, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, imposed the crime of felony (*o*) on him the said plaintiff, by means of which said several premises, the said plaintiff is greatly hurt, injured, and prejudiced in his said good name, fame, and credit, and is brought into great scandal, ignominy, and disgrace amongst all his neighbours and other good and worthy subjects of the realm, and hath been taken, and suspected to

(*n*) Supra, note (m).

(*o*) As to the sufficiency of this general count, see vol. 1. 448.—*Davis* v. *Noak*, 1 Starkie's C. 377. *Blizard* v. *Kelly*. 2 B. and C. 285.

be a felon and a thief, and he the said plaintiff was also imprisoned, and kept and detained in prison, in manner and for the time hereinbefore mentioned, and suffered and underwent many and great troubles and labours, both of body and mind, and during all which time he was hindered and prevented from managing, conducting, and transacting his necessary affairs and business, and was forced and obliged to lay out and expend a large sum of money in and about the obtaining his release from and out of custody as aforesaid, and in and about the defence of himself and the manifestation of his innocence in the premises so alleged and objected against him as aforesaid, and he the said plaintiff also was, hath been, and is, on occasion of the several premises aforesaid, otherwise greatly injured and damnified, to wit, at, &c.

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12. *General Form of Declaration for a malicious Prosecution by Indictment at the Assizes or Sessions, where the Plaintiff was acquitted.*

For that the said defendant maliciously and wickedly intending to oppress and injure him the said plaintiff, on, &c., at, &c., maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with the crime of felony, and caused and procured the said plaintiff to be arrested and committed to the common gaol for the county of ———, and there to be imprisoned, by reason of that charge, for a long space of time, to wit, for the space of ———, and afterwards, to wit, on, &c., at the session of our Lord the King, of oyer and terminer, &c. (*o*), holden at, &c., in and for the said county of ———, before, &c., mali-

(*o*) Or if the prosecution were at the sessions, *thus*, at the General Quarter Session of the peace. holden (*by adjournment, if that be the fact,*) in and for the said county of ——, on, &c., at, &c. before A B., C. D., and others, their fellows; Justices of our said Lord the King, assigned to keep the peace in the county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in that county. This statement ought of course to accord with the caption of the indictment and record of acquittal.

ciously, and without any reasonable or probable cause, indicted and caused and procured to be indicted the said plaintiff, for that he the said plaintiff (*p*), on, &c., at, &c., *(set forth the substance of the charge,)* and that the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, prosecuted and caused and procured to be prosecuted the said indictment against the said plaintiff, to wit, at, &c., until the said plaintiff, afterwards, to wit, at the (*q*) delivery of the gaol of our said Lord the King of his said county of ———, of the prisoners therein holden, on, &c., at, &c., before, &c., assigned to deliver the gaol of the said county of the prisoners therein being, was duly, by a jury of the said county, and by the judgment of the said court of gaol delivery (*r*), duly acquitted of the premises in the said indictment charged, and the said charge and prosecution then and there became and were wholly ended and determined.

Add a general count for imposing the crime of felony, as in Precedent 11.

By means whereof he the said plaintiff hath been and is greatly injured, hurt, and aggrieved in his good name, fame, and credit, and hath suffered and undergone great trouble and labour of his body, and anxiety of mind, and been put to great expense of his monies, to wit, to the amount of ———, in the manifesting his innocence and procuring his acquittal, and hath also been wholly hindered and prevented from transacting his necessary business and affairs, and hath been, and is otherwise greatly injured, prejudiced, and aggrieved, to wit, at, &c.

(*p*) See vol. 1, p. 446.

(*q*) Or if the acquittal were at the quarter sessions, thus—"General Quarter Sessions of the peace of our said Lord the King, holden (by adjournment, *if such be the fact*) on, &c., at, &c., before, &c. The statement should agree with the record of acquittal.

(*r*) Or Quarter Sessions, according to the fact.

13. *Plea of the General Issue (r).*

AND the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, &c., and saith that he is not guilty of the premises above laid to his charge in manner and form as the said plaintiff hath above complained against him, and of this he the said defendant puts himself upon the country, &c.

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14. *Plea of Justification of Words of Felony.*

AND for a further plea in this behalf (*s*), the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he saith that the said plaintiff before the speaking and publishing of the words in the said declaration mentioned, to wit, on, &c., at, &c. (*t*), feloniously did steal, take, and carry away, *(describing the goods* (*u*),) of the goods and chattels of him the said defendant. Wherefore he the said defendant, at the said several times in the said declaration mentioned, did speak and publish of and concerning

(*r*) As to the sufficiency of this plea to enable the defendant to go into evidence in his defence, see vol. 1. 453. Where a special justification is pleaded it is frequently inexpedient to plead the general issue, for the effect is to give the plaintiff the opening and reply.

(*s*) As to the policy of pleading the general issue with this plea, see the last preceding note.

(*t*) Where the justification is local, the defendant ought to plead it in the county where the matter of justification arose, see *Craft* v. *Boite*, 1. Saund. 241. 1 Will. Saund. 247, note 1, and at common law the case ought to be tried there. But a trial in a different county is aided by the st. 16, 17 C. 2. c. 8. Vol. 1, p. 476.

(*u*) As to the description of the felony with reference to the alleged slander, see vol. 1. 478.

the said plaintiff the said several words in the said declaration mentioned (*x*), as he lawfully might for the cause aforesaid, and this he the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

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15. *Plea of Justification of Words of Perjury.*

Because, he says, that before the speaking and publishing of the said words, of and concerning the said plaintiff, in the said ——— counts mentioned, to wit, on, &c. at, &c. at the assizes then and there holden before ———, then chief justice of our said Lord the King, assigned to hold pleas before the King himself, and ———, then one of the justices of our said Lord the King, assigned to hold pleas before the King himself, justices of our said Lord the King, appointed to take the assizes for the said county, according to the form of the statute in such case made and provided, a certain issue before then duly joined in an action brought and prosecuted in the court of our said Lord the King, ——— and his companions, then justices of our said Lord the King, of the bench at Westminster, in the county of Middlesex, by and at the suit of one ———, as the plaintiff, against one ———, as the defendant, for a supposed breach of certain promises and undertakings, alleged by the said ——— to have been made to him by the said ———, and not performed, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue, the said plaintiff appeared as a witness for and on behalf of the said ———, the plaintiff in the said action, and the

(*x*) As to the necessity for confessing the speaking of the words, see vol. 1. 475.

said plaintiff was then and there in open court at the said assizes, holden as aforesaid, before the said —— and ——, the justices aforesaid duly sworn, and took his corporal oath upon the holy Gospel of God, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, (they the said —— and ——, then and there having sufficient and competent power and authority to administer the said oath to the said plaintiff in that behalf,) and upon the said trial of the said issue, certain questions then and there became and were material, to wit, whether, &c. *(here state the questions according to the fact, and as they relate to the charge of perjury against the plaintiff,)* and the said defendant further says, that the said plaintiff being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, falsely, wickedly, wilfully, maliciously, and corruptly, and by his own act and consent, did say, depose, swear, and give in evidence, amonst other things, at and upon the said trial, to and before the said jurors so sworn to try the said issue as aforesaid, and the justices aforesaid, that, &c. *(here state that part of the plaintiff's evidence in which he committed the perjury,)* whereas in truth and in fact, &c. *(here negative the plaintiff's evidence as in an indictment for perjury,)* and the said plaintiff did thereby, in the said court, at the said assizes so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, wilfully, and corruptly, commit wilful and corrupt perjury, wherefore the said defendant, at the said several times, when, &c. in the said —— counts mentioned, at, &c. aforesaid, spoke and published of and concerning the said plaintiff the several words in the said —— counts, mentioned to have been spoken and published by him the said defendant, of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid. And this, &c. *(as in precedent* 14.*)*

16. *Plea of Justification to a Declaration for a Libel on a Dissenting Minister, charging him with having uttered personal Invectives from the Pulpit against a third Person* (*y*).

THAT before and at the time of the speaking and publishing of the several scandalous words by the said plaintiff, as hereinafter mentioned, one Margaret Fair did assist in the management and conduct of a certain Sunday School, and was a person of distinguished merit and spotless reputation, and that the plaintiff, well knowing the premises, before the several times of printing and publishing the several supposed libels by the defendants, as in the declaration mentioned, to wit, on the 6th of April, 1823, at Great Marlow aforesaid, just before his preaching and delivering a certain discourse or sermon, then and there by him, as such pastor or minister, addressed to a certain congregation of the said dissenters, assembled for the purpose of (amongst other things) hearing the said discourse or sermon, in a certain chapel, and whilst he the plaintiff was officiating in the said chapel as pastor or minister, spoke and published, from a certain part or station of the said chapel, assigned to him as pastor or minister for the preaching and delivering of the discourse or sermon, and to and in the presence of the congregation, of and concerning the said Margaret Fair, these scandalous words following:—"I have something to say which I have thought of saying some time, namely, the improper conduct of one of the female teachers; her name is Miss Fair, her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again. Miss Fair does more harm than good." And thereby then and there gave great offence to divers of the said dissenters, to wit, one

(*y*) See *Edwards* v. *Bell*, 1 Bingh. 403. On a motion for judgment for the plaintiff non obstante veredicto, the plea was held to be an answer to the declaration.

Joseph Wright, the elder, one, &c., and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned. Wherefore the said defendants did afterwards, to wit, at the several times when, &c., in the declaration mentioned, print and publish the supposed libels in the declaration mentioned, as they lawfully might for the cause aforesaid, which are the same printing and publishing the supposed libels in the declaration mentioned, and this they are ready to verify, wherefore they pray judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. *There were other pleas to the same effect.*

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17. *General Replication de injuriâ, &c. to Pleas of Justification.*

And as to the said pleas of the said defendant, by him secondly and thirdly above pleaded, the said plaintiff saith that he, by reason of any thing by the said defendant in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, in respect of the said grievance in the said declaration mentioned (*or* in the said first and second counts mentioned; *or* in the introductory parts of the said second and third pleas mentioned,) because he saith that the said defendant, at the said times, when, &c., in the said declaration (*or* in the said first and second counts, or either of them, *or* in the introductory parts of the said second and third pleas, or either of them,) mentioned of his own wrong, and without the cause by him the said defendant in his said second and third pleas, or either of them mentioned, did commit the said grievances (*a*) in the said declaration (or first and second counts, *or* introductory parts of the said second and third pleas,)

(*a*) Formerly it was usual to repeat the words in the replication, see *Croft* v. *Boite*, 1 Saund. 244, but this is wholly unnecessary.—See 1. Will. Saund. 244. a. note (7).

mentioned, in manner and form as the said plaintiff hath above thereof complained against him the said defendant, to wit, at, &c. And this he the said plaintiff prays may be inquired of by the country, &c.

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18. *Information, by the Attorney-General, for a Libel against a Foreign Potentate* (*b*).

THAT before and at the times of the printing and publication of the scandalous, malicious, and defamatory libels and libellous matters and things after mentioned, there subsisted, and now subsists friendship and peace between our Sovereign Lord the King and the French Republic, and the subjects of our said Lord the King and the citizens of the said Republic; and that before and at those times, citizen Napoleon Bonaparte was and yet is First Consul of the said French Republic, to wit, at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex; and that Jean Peltier, late of Westminster, in the county of Middlesex, gentleman, well knowing the premises aforesaid, but being a malicious and ill disposed person, and unlawfully and maliciously devising and intending to traduce, defame, and vilify the said Napoleon Bonaparte, and to bring him into great hatred and contempt, as well among the liege subjects of our said Lord the King, as among the citizens of the said Republic, and to excite aud provoke the citizens of the said Republic by force of arms to deprive the said Napoleon Bonaparte of his consular office and magistracy in the said Republic, and to kill and destroy the said Napoleon Bonaparte, and also unlawfully and maliciously devising as much as in him, the said Jean Peltier, lay, to interrupt, disturb, and destroy the friendship and peace subsisting between our said Lord the King and his subjects, and the said Napoleon

(*b*) This was the form used in *Peltier's Case*. Supra, vol. 2. p. 218.

Bonaparte, the French Republic, and the citizens of the same Republic, and to excite animosity, jealousy, and hatred in the said Napoleon Bonaparte against our said Lord the King and his subjects, on the 16th day of August, in the forty-second year of the reign of our Sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith; at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a most scandalous and malicious libel, in the French language, of and concerning the said Napoleon Bonaparte, that is to say, one part thereof to the tenor following, that is to say, "Le 18 Brumaire, An viii. Ode attribuée a Chenier,

"Quelles tempètes effroyables
"Grondent sur les flots déchaînés," &c.

And in another part thereof to the tenor following, that is to say,

"Déja dans sa rage insolente," &c.

Which said scandalous and malicious words, in the French language, first above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "What frightful tempests growl on the unchained waves," &c.

And which said scandalous and malicious words secondly above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "Already," &c.

Second Count. — That the said Jean Peltier so being such person as aforesaid, and unlawfully and maliciously devising and intending as aforesaid, afterwards, to wit, on the 26th of August, in the forty-second year of the reign aforesaid, at the parish of St. Anne, in the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a certain other scandalous and malicious libel, containing therein among other

things, divers other scandalous and malicious matters, in the French language, of and concerning the said Napoleon Bonaparte, in the form of an address to the French people, according to the tenor following, that is to say, "Citoyens," &c. Which said scandalous and malicious words, in the French language, last before mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "Citizens," &c. To the great scandal, disgrace, and danger of the said Napoleon Bonaparte, to the great danger of creating discord between our said Lord the King and his subjects and the said Napoleon Bonaparte, the French Republic, and the citizens of the said Republic, in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our said Lord the King, his crown, and dignity. Whereupon the said Attorney General of our said Lord the King, who for our said Lord the King in this behalf prosecuteth for our said Lord the King, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said Jean Peltier in this behalf, to make him answer to our said Lord the King touching and concerning the premises aforesaid (*a*).

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19. *Indictment for uttering Seditious Words.*

That A. B. late of, &c., labourer, being a wicked, seditious, and evil-disposed person, and greatly disaffected to our said Lord the King, and contriving and intending the liege subjects of our said Lord the King to incite and move to hatred and dislike of the person of our said Lord the King, and of the government established within this realm, on, &c., with force and arms, at, &c., in the presence and hearing of divers liege subjects of our said Lord the King, maliciously, unlawfully, wickedly, and seditiously did publish, utter, and

(*b*) The information contained three other counts.

declare with a loud voice, of and concerning our said Lord the King, these words following, that is to say, "His Majesty, George the Third, (meaning our said Lord the King,) is *****, thank God for it; I (meaning the said A. B.) hope he (meaning our said Lord the King,) will soon be no more; damnation to all royalists," to the great scandal of our said Lord the King, in contempt of our said Lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace, &c.

Second Count.—And the jurors, aforesaid, &c. That the said A. B. being such wicked, seditious, and evil-disposed person as aforesaid, and greatly disaffected to our said Lord the King, and contriving and intending the liege subjects of our said Lord the King to incite and move to hatred and dislike of the person of our said Lord the King, and the government established within this realm, on, &c., with force and arms, at, &c., unlawfully, wickedly, maliciously, and seditiously, in the presence and hearing of divers liege subjects of our said Lord the King, again did publish, utter, and declare of and concerning our said Lord the King, and his good, true, and faithful subjects, these words following, that is to say, "I (meaning the said A. B.) hope King George the Third (meaning our said Lord the King,) will soon be no more; damnation to all royalists." *(Conclusion as before.)*

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20. *Information for Writing and Publishing a Libel against the King and Government.*

That I. H., late of London, clerk, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontent and sedition among his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his Majes-

ty's subjects from his said Majesty, and to insinuate, and cause it to be believed, that divers of his said Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his said Majesty's government, on, &c., with (*c*) force and arms, at (*d*), &c., wickedly, maliciously (*e*), and seditiously did write and publish (*f*), and cause and procure to be written and published, a certain false (*g*) wicked, malicious, scandalous, and seditious libel (*h*), of and concerning his said Majesty's government, and the employment of his troops, according to the tenor and effect (*i*) following:

"King's Arms-Tavern, Cornhill, June 7, 1775.

"At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his Majesty's (*k*)) troops at Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America,) on the

(*c*) This allegation is unnecessary, see 7 T. R. 4.

(*d*) As to the venue, see vol. 2, p. 302.

(*e*) As to this averment, see vol. 2, p. 303. Sty. 392. 1 Vin. Ab. 33.

(*f*) Supra, vol. 1, p. 358. *Baldwin* v. *Elphinstone*, Bl. R. 1037.

(*g*) This allegation need not be proved, see 7 T. R. 4. and supra, vol. 2, p. 303.

(*h*) See vol. 1, p. 358.

(*i*) See vol. 1, p. 364.

(*k*) As to the nature and use of an innuendo, see vol. 1, p. 418.

nineteenth of last April; which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself the said I. H.) do pay to-morrow into the hands of Messrs. B. and C. on account of Dr. F. the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above-mentioned purpose. I. H."

(Meaning himself the said I. H.) In contempt of our said Lord the King, in open violation of the laws of this kingdom, and against the peace, &c.

Second Count.—That the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously devising, contriving, and intending as aforesaid, afterwards, to wit, on, &c., with force and arms, at, &c. wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper, entitled, "The Morning Chronicle and London Advertiser," a certain other false, wicked, scandalous, malicious, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (setting out the libel as before.)

Third and Fourth Counts.—For publishing the same in other newspapers.

Fifth Count.—Wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (as before.)

Sixth Count.—For printing and publishing the former part of the libel.

Seventh Count.—And the said Attorney General of our said Lord the King, for our said Lord the King further gives the court here to understand and be informed, that the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously contriving, devising, and intending, as aforesaid, afterwards, to wit, on, &c.,

with force and arms, at, &c., wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, scandalous, malicious, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following:—"I (meaning himself the said I. H.) think it proper to give the unknown contributor this notice, that I (again meaning himself the said I. H.) did yesterday pay to Messrs. B. and C. on the account of Dr. F. the sum of fifty pounds, and that I (again meaning himself the said I. H.) will write to Dr. F. requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America,) on the nineteenth of last April. I. H." (Again meaning himself the said I. H.)—(Conclusion as before (*l*)).

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21. *Indictment for Writing and Delivering a Challenge at the instance of a third Person.*

That A. B., late of, &c., Esq., on, &c., at, &c., being of a turbulent, wicked, and malicious disposition, and intending to procure great bodily harm and mischief to be done to C. D., late of, &c., in the county aforesaid, Esquire, and also intending, as much as in him the said A. B. lay, to incite and provoke the said C. D. unlawfully to fight a duel with and against one

(*l*) The original, see Cowp. 683. contains other counts stating the printing and publishing of the latter libel in different newspapers, and also the publishing of both on different days.

E. F., late of the same place, Esquire, on the said second day of December, in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously write, and cause to be written, a certain paper-writing, in the words, letters, and figures following, to wit,— "To C. D., Esquire, at B. (meaning the said C. D.) by the desire of Mr. E. F. (meaning the said E. F.) I (meaning himself the said A. B.) wait on you (meaning the said C. D.) to inform you (meaning the said C. D.) that he (meaning the said E. F.) expects such satisfaction as one gentleman should require from another, for an insult bestowed on him; your (meaning the said C. D's) conduct merits every treatment a scoundrel deserves. Manner, time, and place left to you (meaning the said C. D.) A. B. Dec. 2." (Meaning and intending by the said paper-writing a challenge to the said C. D. to fight a duel with and against the said E. F.) which said paper-writing (meaning and intending the same as such challenge as aforesaid,) he the said A. B. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously did deliver, and cause to be delivered, to the said C. D. against the peace, &c.

Second Count—for delivering a written Challenge as from, and on the part, and by the desire of E. F.

THAT the said A. B. being such evil-disposed person and disturber of the peace of our said Lord the King, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on the same day and year aforesaid, with force and arms, at B., aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously deliver, and cause to be delivered, a certain written challenge, as from, and on the part, and by the desire of the said E. F., to the said C. D. unlawfully to fight a duel with and against the said E. F., which said last-mentioned

challenge is as follows, that is to say, (*set out the challenge,*) against the peace of our said Lord the King, his crown and dignity.

Third Count—for provoking and inciting the Prosecutor to Fight.

THAT the said A. B. being such evil-disposed person, and disturber of the peace of our said Lord the King, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on the same day and year aforesaid, with force and arms, at B., aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously provoke and incite the said C. D. (in the peace of God and our said Lord the King then and there being,) unlawfully to fight a duel with and against the said E. F., against the peace, &c.

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22. Information for Challenging and Posting.

THAT A. B., late of, &c. Esquire, being a person of a turbulent, wicked, and malicious disposition, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously intending, as much as in him lay, not only to terrify and affright one C. a good and peaceable subject of our said Lord the King, but also to kill and murder him, heretofore, to wit, on, &c., with force and arms, at, &c. unlawfully and wickedly did provoke and challenge the said C. to fight and duel against him the said A. B. with sword and pistol; and the said ——— of our said Lord the King, giveth the Court here further to understand and be informed, that the said C. having then and there refused to fight with the said A. B. in pursuance of such wicked and unlawful challenge last aforesaid, he the said A. B. for the

completing his aforesaid evil and wicked purpose and design, and further to provoke and incite the said C. to fight and duel against him the said A. B. in the manner aforesaid, afterwards, to wit, on the same day and year aforesaid, at C. aforesaid, in the county aforesaid, did wickedly and maliciously place, stick up, and upon, and caused to be placed, stuck up, and exposed to public view, to wit, on the market house in C. aforesaid, a certain paper writing, with the name of him the said A. B. thereunto subscribed, containing certain scurrilous and abusive matter against the said C. of the tenor following, that is to say, "Having received (meaning thereby that the said A. B. had received,) a most ungentlemanlike affront from C. H. esquire, (meaning the said C.) I (meaning himself the said A. B.) distinguish him (meaning the said C.) thus, that none may doubt the individual man of ——, in the county of M. he (again meaning the said C.) having in the most cowardly manner refused to give me (meaning himself the said A. B.) the satisfaction due to a gentleman, I, (meaning himself the said A. B.) here in the sight and for the information of his countrymen, post him, (meaning the said C.) and declare him (again meaning the said C.) to be a dirty, cowardly, insolent fool, as such, I (meaning himself the said A. B.) will ever treat him, (meaning the said C.) A. B. of B. in the county of M." to the great damage and terror of him the said C. H. and against the peace of our said Lord the King, his crown, and dignity.

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23. *Indictment for Drawing in Effigy the Collectors of the Assessed Taxes, in pursuance of a Conspiracy.*

That A. B. late of, &c. labourer, C. D. late of the same place, labourer, &c. being respectively persons of evil, envious, and wicked minds, and of most malicious dispositions, and maliciously and unlawfully devis-

ing and intending to injure and aggrieve one E. F. gentleman, then and there being an officer and person engaged and employed in certain business relating to the revenue of our said Lord the King, to wit, an inspector of the duties on horses and windows, and all other duties under the management of the commissioners for managing his Majesty's affairs of taxes, by several acts granted to his Majesty, and G. H. then and there being an officer and person engaged and employed in certain business relating to the revenue of our said Lord the King, to wit, an officer for the survey and inspection of the several and respective rates and duties upon horses, windows, and lights, and upon inhabited houses, and upon male servants, carriages, horses, mules, and dogs, by certain acts of parliament granted to his Majesty, and for viewing and numbering the several lights or windows in each house, and inspecting and examining the assessment or certificate thereof, made or to be made according to the direction of certain acts of parliament, and for doing all other matters by the statutes in such case made and provided, requisite to be done by an officer of that nature, in the county of ——, being respectively good, peaceable, and well-disposed subjects of our said Lord the King, and to bring them into great contempt, infamy, hatred, and disgrace, on &c. with force and arms, at, &c. unlawfully and maliciously did conspire, combine, confederate, and agree among themselves, and together with divers other evil-disposed persons, whose names are unknown to the jurors aforesaid, to traduce, defame, vilify, and bring into public hatred, ridicule, and contempt, the said E. F. and G. H. as such officers as aforesaid, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c.; and that the said A. B. &c. in pursuance of and according to the conspiracy, combination, confederacy, and agreement as aforesaid before had, afterwards, to wit, on, &c. with force and arms, at, &c. unlawfully and maliciously did put and place, and cause and procure to be put and placed, two figures or effigies, the said effigies or figures being intended to represent the said E. F. and G. H. in a certain cart; and then and there unlawfully

did, by and with a certain horse, draw, and cause to be drawn, the said cart with the said effigies so put and placed therein, and exposed to public sight and view, in, through, and along divers public streets and common highways there, and also before and near the dwelling-house of the said E. F. and dwelling-houses of divers liege subjects of our said lord the king there situate, and in the presence, sight, and view of divers liege subjects of our said lord the king, in the manner in which criminals are usually conveyed to the place of execution; and did then and there, during all that time, toll, and caused to be tolled, a certain large bell of and belonging to a certain church at ———, and made and caused to be made a great noise, riot, rout, and tumult, and disturbance, and utter and cause to be uttered, divers malicious and opprobrious words and speeches, defaming and vilifying the said E. F. &c. and among others the opprobrious words and speeches following, that is to say, "Damn the dog taxers, (meaning, &c.) damn the window peepers (meaning, &c.);" and beat and caused to be beaten the heads and faces and other parts of the said effigies and figures, and did afterwards, to wit, on, &c. at, &c. cast and throw the said effigies or figures into a certain river or stream of water, to denote and represent the death and drowning of them the said, &c. and did then and there, immediately after such casting and throwing, ring, and cause to be rung, divers bells in and belonging to a certain church at, &c. in the manner in which the said bells were used to be rung on joyful occasions; and did afterwards, to wit, on, &c. at, &c. compose, write, and publish, and cause and procure to be composed, written, and published, a certain malicious and scandalous libel, containing, amongst other things therein, divers scandalous and malicious matters and things, of and concerning the said, &c. to the tenor and effect following, that is to say, "These two unfortunate malefactors (meaning, &c.) were drawn to the place of execution, attended by that able priest, J. W.; on their arrival, E. F. (meaning, &c.) stood up, and with uplifted hands addressed the spectators as follows,—'Fellow mortals, you have now presented to

your view, one of the most unfortunate of men, (meaning, &c.) whose villainy has brought him to the most detestable of all deaths! I (meaning, &c.) have been the bane of social comfort to many: you now see the consequences of incorrigible roguery; I (meaning, &c.) have rid numbers of the golden dropsy which subsists near the purse, in order to add to my own disease, which will soon terminate my existence. To what dark abyss am I hastening! to unknown regions and pains yet unfelt by me! Ah! too late do I repent; the time is come I must answer to the call of justice; had I been just and true, half honest would have served me. I claim forgiveness of you, though I have wronged you all alike, with this my vile associate, (meaning, &c.) partner of my villainies,—sharer of my gains; words are wanting to convince you, how my conscience goads me; Heaven hath now poured down curses on my head.' N. B. This speech was answered by some pretty loud huzzas. The other miscreant (meaning, &c.) then stood up, and with most beastly howl thus addressed the delighted spectators, — 'Ungrateful wretches, you now behold a man (meaning, &c.) in the face of death, whose courage dares to call you by your proper titles. You say, I am of notorious ploughshare and buckle memory. Yes, I am (meaning, &c.); my conduct as such commanded your esteem; I (meaning, &c.) took but 20s. and gave you two; but I am now foiled in my attempt to strip you of all within your shallow purses. With an eternal chaos before my eyes, I tell you, we (meaning, &c.) have shared £1500; this I say, to gripe your empty pockets. Had we (meaning, &c.) lived, your persons should have been in pawn to glut our empty coffers. Now farewell, we shall meet anon, to compliment each other on our rogueries. I (meaning, &c.) bid you all farewell.' This hardened villain's (meaning the said, &c.) speech was answered by much hissing and clapping of hands. They (meaning, &c.) were then drowned, drawn, quartered, and dissected; the joyful ceremony was finished by bell-ringing, and the sudden transition of every one's countenance from that of a melancholy to a joyful aspect. Jemmy, the priest, endeavoured to convert them by

sundry hard blows and divers bruises. Long live the king."—To the great scandal, infamy, and damage of the said, &c. to the evil example of all others, and against the peace of our said lord the king, his crown, and dignity.

2nd Count.—And the jurors aforesaid, on their oath aforesaid, do further present, that the said, &c. being respectively such persons as aforesaid, and maliciously and unlawfully devising and intending to injure and aggrieve the said, &c. then and there being respectively good, peaceable, and well-disposed subjects of our said Lord the King, and to bring them into great contempt, infamy, hatred, and disgrace, on, &c. with force and arms, at &c. unlawfully and maliciously did conspire, combine, confederate, and agree among themselves, and with divers other evil-disposed persons whose names are unknown to the jurors aforesaid, to traduce, defame, vilify, and bring into public hatred, ridicule, and contempt, the said, &c. and the characters and conduct of them the said, &c. respectively, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c. aforesaid; and that the said C. D. &c. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, so as aforesaid had, afterwards, to wit, on, &c. with force and arms, at, &c. aforesaid, unlawfully and maliciously did put and place, and cause and procure to be put and placed, &c. *(as in first count).*

3rd Count.—Intending to injure the said, &c. as such *officers*, as aforesaid, &c. and to make, and cause to be made, a great noise, &c. *(as before in first count,)* unlawfully and maliciously did put and place, &c. *(as in the first count, but more generally, and omitting all the opprobrious words, except* damn the dog taxers and window peepers.)

4th Count.—Same as third, except in the description of E. F. &c. as *officers.*

23. *Indictment for a Libel on an Individual.*

THAT C. D. late of ———, being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of A. B. a good, peaceable, and worthy subject of our said Lord the King, and to bring him into public scandal, hatred, infamy, and disgrace, (*or* into public scandal, contempt, ridicule, and disgrace, &c. according to the nature of the libel,) with force and arms, on, &c. at, &c. of his great hatred, malice, and ill-will towards the said A. B. wickedly, maliciously, and unlawfully, did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say, *(set out a copy, with proper innuendos to explain the meaning, if they be necessary,)* which said scandalous, malicious, and defamatory libel, he the said C. D. afterwards, to wit, on, &c. at, &c. wickedly, maliciously, and unlawfully did send (*a*) and cause to be sent to one E. F. in the form of a letter, directed to the said E. F. and did thereby then and there unlawfully, wickedly, and maliciously publish, and cause to be published, the said libel, to the great damage, disgrace, scandal, and infamy of the said A. B. and against the peace, &c.

2nd Count.—That the said C. D. being such envious, evil, wicked, and malicious person, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as aforesaid, afterwards, to wit, on the same day

(*a*) Where the libel merely reflects on a person in his profession, trade, or business, and the publication is confined to that person, it is not sufficient to aver an intention to disparage and injure the party in his profession, trade, or business; the indictment ought to allege an intent to provoke and excite the prosecution to a breach of the peace. *R.* v. *Wegener*, 1 Starkie's C. 543; supra, vol. 2, 324.

and year aforesaid, with force and arms, at, &c. of his great hatred, malice, and ill-will towards the said A. B. wickedly, maliciously, and unlawfully, did write (*or* print) and publish, and cause and procure to be written (*or* printed) and published a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B. that is to say, *(set out the libel and conclude as before.)*

3rd Count.—For publishing generally.

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24. *Indictment for exposing to Sale and Public View an obscene Print* (*b*).

That A. B. late of, &c. being a scandalous and evil disposed person, and not having the fear of God in his heart, but devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lord the King, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c. with force and arms, at, &c. in a certain open and public shop of him the said A. B. there situate, unlawfully, wickedly, maliciously, and scandalously, did publish, sell, and utter to one C. D. a liege subject of our said Lord the King, a certain lewd, wicked, scandalous, infamous, and obscene print, on paper, entitled ———, representing, &c. *(as in the print,)* and which said lewd, wicked, scandalous, infamous, and obscene print, on paper, was contained in a certain printed pamphlet, then and there uttered and sold by him the said A. B. to the said C. D. entitled ———, to the manifest corruption and subversion of youth, and other liege subjects of our said Lord the King, in their manners and conversation, in contempt of our said Lord the King and his laws, and against the peace, &c.

In a *second count* allege the publication generally, omitting that it was contained in any pamphlet, &c.

(*b*) As to this offence, see vol. 2, p. 155.

THE

APPENDIX.

Preliminary Discourse, p. cxv.—*The fact that Sylla, &c.*

"Veruntamen est *Majestas*, et sic Sylla voluit, ne in quemvis impune declamare liceret." Cic. Epist. ad Fam. 3. 16. But Tacitus declares that Augustus was the first who ranked defamation under the crime of treason. "Primus Augustus cognitionem de Libellis Famosis, specie ejus legis tractavit." Annal. Lib. i. 72.

Preliminary Discourse, p. cxv.—*Agrippina, his Daughter in Law, &c.*

i. e. by her marriage with Germanicus, the *adopted* son of Tiberius.

Vol. I. p. 5.—*Falsity of the Communication.*

Lord Ellenborough, C. J. in *Maitland* v. *Goldney*, 2 East, 426, observed, "In order to maintain this species of action, it is necessary that there should be; 1. malice in the defendant; 2. an injury to the plaintiff; 3. that the words should be *untrue*."

Vol. I. p. 7.—*Libel.*

The term *Libel*, in the English law, is, no doubt, *immediately* derived (however differing from it in many essential particulars,) from the *Libellus Famosus* of the Roman law.

Vol. I. p. 88.—*Forsworn, &c.*

WHERE the words were "Mr. H—'s oath is not to be taken, for he has been a forsworn man; I can bring people to prove it, and they that know him will not sit in the jury box with him," it was held that they were

not actionable, without averments to show that they were spoken in reference to the conduct of the plaintiff as a juror. *Hall* v. *Weedon*, 8 D. and R. 140.

Vol. I. p. 89.

To say "he has defrauded a mealman of a roan horse, is not actionable, it not being said to have been done by a false pretence, or in any criminal way." *Richardson* v. *Allen*, 2 Chitt. C. T. M. 652.

Vol. I. p. 107.

The words, "I think the business ought to have the most rigid inquiry, for he murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," were held to be actionable, as importing at least a charge of manslaughter; and though the words were doubtful, the doubt would be cured by the finding of a jury, that they were meant in that sense. *Ford* v. *Primrose*, 5 D. and R. 289.

Vol. I. p. 123.—*Words of Justices, &c.*

The words, "you are a rascal, a villain, and a liar," spoken of a justice in the execution of his office, are actionable, for they import a charge of *acting* corruptly and partially. *Aston* v. *Blagrave*, Str. 617.

Vol. I. p. 162.

In the case of the *Archbishop of Tuam* v. *Robeson*, 5 Bingh. 17, it was held, that to publish, in writing, of an archbishop, that he had attempted to convert a Catholic priest to become a Protestant clergyman, by offers of money and preferment, was actionable. And Best, C. J. after observing, that in *Lord Kerry* v. *Thorley*, the distinction between oral and written slander had been established too firmly to be shaken, observed, "according to that case, in order to support an action for oral slander, something criminal must have been imputed; but in a libel, any tendency to bring a party into contempt and ridicule is actionable, and in

general any charge of immoral conduct, although in matters not punishable at law."

In the case of *Woodward* v. *Dowsing*, 2 M. & R. 74, Lord Tenterden said, "This is a case of written slander, in which shape, whatever tends to bring a party into public hatred and disgrace, is actionable. Can any man read this libel without saying that it charges the plaintiff with oppressive conduct?" And therefore it was held, in that case, that a written charge against an overseer, of oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour on a particular tradesman was actionable, though the writer was mistaken, in supposing that the misconduct complained of was an offence within the stat. 55 G. 3. c. 139. s. 6.

In *Clement* v. *Chivis*, in error, 9 B. and C. 172, it was held, that it was libellous and actionable to publish of a coachman, that he had been guilty of gross misconduct and had insulted two females and one gentleman, who were outside, in a barefaced manner.

Vol. I. p. 169.

It is no defence to an action for a libel tending to make a man ridiculous, that he himself told the same story to a party of friends. *Cook* v. *Ward*, 6 Bingh. 409.

Vol. I. p. 214.

The *law infers malice, &c.* See *Haire* v. *Wilson*, 9 B. & C. 643, where the court of K. B. held, that where the tendency of the libel was injurious to the plaintiff, it ought not to be left as a question for the jury, whether the defendant intended to injure the plaintiff.

Vol. I. p. 273.—*Judicial Report.*

In *Saunders* v. *Mills*, 6 Bingh. 213, it was held, that a statement in a newspaper of the speech of a counsel, in a cause reflecting on the character of the plaintiff, who was the defendant in that cause, without stating

any evidence, could not be justified, though the defendant proved that he had copied the paragraph from another paper.

Vol. I. p. 279.—*Probable Cause.*

And see *Davis* v. *Hardy*, 6 B. and C. 225. Davis hired a chaise in the name of Hardy, and received from the assignee of Martin, a bankrupt, the amount of the chaise hire; he did not pay it to the innkeeper or to Hardy, nor did he mention to the latter that he had received the amount. Upon a charge being preferred against Davis, he was examined before one of the magistrates, and admitted most of the facts. On this evidence the learned judge, at the trial, was of opinion, that there was sufficient evidence of the want of probable cause for indicting Davis for embezzlement. Staines, the proprietor of the chaise, was afterwards called as a witness for the defendant, and it appeared, on his evidence, that Staines having applied to Davis for payment, the latter requested Staines not to tell Hardy, for it would do him a great injury. The learned judge being of opinion that the subsequent facts, coupled with the former, shewed reasonable and probable cause, nonsuited the plaintiff, though pressed, by the defendant's counsel, to leave it to the jury, whether they believed Staines's evidence; and the Court of K. B. refused to set aside the verdict.

Vol. I. p. 291.—*Called upon him to perform.*

Add, "but where the occasion does not furnish an absolute defence, independently of the question of intention."

Vol. I. p. 294.—*Falsely and maliciously.*

But see *Pattison* v. *Jones*, 8 B. and C. 578.

Vol. I. p. 301.—*Where a Master unasked gives a Character of a Servant.*

The master wrote a first letter without a previous

application having been made for a character of the servant, but wrote a second in answer to inquiries made of him as to the plaintiff's character. Lord Tenterden, C. J. left it to the jury to say, whether the communication contained in that letter was made by him *bonâ fide*, acting under a belief, that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously, with an intention of doing an injury to the plaintiff; and the jury having found that the communication was maliciously made, the court refused to disturb the verdict.

Littledale, J. observed, "At all events, where the master volunteers to give the character, stronger evidence will be required that he acted *bonâ fide*, than in the case where he has given the character after being required to do so." *Pattison* v. *Jones*, 8 B. and C. 578.

In the same case, the lord chief justice, on evidence being tendered of the truth of the statements made in the letter, in order to show that the communication was made *bonâ fide*, expressed some doubt whether such evidence was receivable under the plea of the general issue, but received the evidence.

In the case of *Child* v. *Affleck*, 9 B. & C. 403, the defendant had, on application for a character, stated, in a written answer, that the plaintiff had, whilst in her service, conducted herself disgracefully, and that she had since been a prostitute; and a similar statement had been made by the defendant to persons who had recommended the plaintiff to her; it was held, that they were privileged communications, and that the plaintiff was properly nonsuited for want of proof of malice.

Vol. I. p. 329.—*Repetition of Slander.*

In the case of *De Crespigny* v. *Wellesley*, 5 Bingh. 392, it was held, after much argument, and on examination of all the authorities, that in an action for libel, it is insufficient to plead that the defendant received the libellous statement from another, and that upon publication he disclosed the author's name.

Vol. I. p. 347.—*On Partners, &c.*

An allegation that words were spoken concerning three plaintiffs (partners) in their joint trade, is not supported by proof that they were addressed to one of them personally. *Solomons* v. *Medex*, 1 Starkie's C. 191.

Vol. I. p. 373.—*Variance, &c.*

Where the words laid in the declaration were, "I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while," the proof was of the words, "he has worked for me some time, and has been continually robbing me;" it was held that the variance was not material; it was also held that the circumstance of the words having been spoken to an officer who had a warrant to search the plaintiff's house for goods suspected to have been stolen from the defendant, made no difference. *Doncaster* v. *Hewson*, 2 M. and R. 176.

The words laid in the declaration were, "Ware hawk, *you must take care of yourself there*, mind what you are about," and were alleged to have been spoken to a person about to supply the plaintiff with goods; it was held, that the omission to prove the words in italics was not a material variance. *Orpwood* v. *Barkes*, 4 Bingh. 261. Where the plaintiff declared, in respect of a libel upon him in his character of surveyor of "The New England Company," it was held to be sufficient to prove an employment by a company generally known by that name. *Rutherford* v. *Evans*, 6 Bingh. 451.

Vol. I. p. 377.—*Variance, &c.*

By the late stat. 9 G. 4. c. 15, it is enacted, that it shall and may be lawful for every court of record, holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be

pending, before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable.

Vol. I. p. 383.—*Application to the plaintiff.*

Where the declaration alleged that the defendant did print and publish, of and concerning the plaintiff, a libel, containing the false and scandalous matter following, without alleging that the matter was of and concerning the plaintiff, and then set out the alleged libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff, the count was held to be bad, on a writ of error brought. *Clement* v. *Fisher*, 7 B. and C. 459.

Vol. I. p. 391.—*Extrinsic Facts, when to be Averred.*

Where the declaration averred that the plaintiff was a justice of the peace, and that the libel was published of him as such justice, and the alleged libel stated, in substance, that the plaintiff had been chairman of the finance committee of the county, and had audited accounts containing items to a large amount, nominally to furnish lodgings for the judges, but, in reality, for the accommodation of the magistrates, as the sheriff had always provided suitable lodgings without putting the county to any expense, innuendo, (thereby meaning that the plaintiff had conducted himself corruptly, unduly, and improperly, in his office of justice,) it was held, that the libel was not on the face of it actionable, and that there being no preparatory averment to which the innuendo, by referring, might have shown it to be an offence in him to have so audited the accounts, the defect was not cured

by verdict, and judgment was therefore arrested. *Adams* v. *Mendew*, 2 Y. and J. 417. See also *Goldstein* v. *Foss*, vol. 2, p. 305; *Stockley* v. *Clement*, ib.

Where the libellous meaning is apparent on the face of the libel, innuendos are unnecessary, but though they be unnecessarily introduced and be unsupported by prefatory averments, they do not vitiate the declaration. *Archbishop of Tuam* v. *Robeson*, 5 Bingh. 17.

Vol. I. p. 465.—*Where the Defendant maintains that the Imputation is true, &c.*

So the defendant is not at liberty to give evidence, in mitigation of damages, of any fact which would be evidence to prove a justification of any part of the libel; for he ought to justify as to that part. *Vessey* v. *Pike*, 3 C. & P. 512.

Vol. I. p. 426.

An innuendo will not vitiate, &c. See also *Archbishop of Tuam* v. *Robeson*, 5 Bingh. 17.

Vol. I. p. 304.—*Except for the purpose of legal inquiry.*

And although statements made in regular proceedings at law are privileged if *bonâ fide* made, though they may not be true, yet a letter addressed to a judge being an irregular and improper proceeding, cannot be considered as falling within the class of privileged communications. *Gould* v. *Hulme*, 3 C. & P. 625.

Vol. I. p. 305.—*Literary Criticism, &c.*

In *Thompson* v. *Shackell*, 1 M. & M. 187, on the trial of an action for an alleged libel, concerning a picture of the plaintiff's, exhibited at Somerset House, describing it as a mere daub, Best, C. J. left it to the jury to say, whether the publication was a fair and temperate criticism on the painting of the plaintiff, or was made the vehicle of personal malignity towards the plaintiff. He added, "I myself have acted on the doctrine of my Lord Ellen-

borough, in the case referred to, (*Carr* v. *Hood,*) though I do not go quite so far as he did in that case, because I think no *personal* ridicule of the author is justifiable; but if this be really an *honest* criticism, and no more, the defendant is entitled to your verdict." Verdict for the defendant.

In the case of *Soane* v. *Knight,* 1 M. and M. 74, the plaintiff, an architect, complained of a libel published of him in his profession; the alleged libel professed to give an account of a new order of architecture, called the Bœotian Order, stating it to have been invented by the plaintiff, and illustrated the new order by examples of such buildings, all the buildings instanced being the works of the plaintiff. Lord Tenterden, in summing up to the jury, said, "This publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case, the censure is certainly strong, nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff."—Verdict for the defendant.

Whatever can be fairly said of the works of an author or of himself, as connected with the work, is not actionable, unless it appear that, under the pretext of criticism, the party takes the opportunity of calumniating the author. *M'Leod* v. *Wakeley,* 3 C. & P. 311.

Vol. II. p. 9.—*Publication.*

It is sufficient to produce a newspaper in evidence,

corresponding in title, &c. with the description in the affidavit filed at the stamp-office. *Mayne* v. *Fletcher*, 9 B. and C. 382. *R.* v. *Hunt*, ib. 31. Howell's St. Tr. 375.

Vol. II. p. 31.—*Publication by an Agent, &c.*

In the case of *R.* v. *Gutch and another*, 1 M. and M. 433, on an information against proprietors of a newspaper, for publishing a libel. Lord Tenterden, C. J. in summing up, said, "on the part of Mr. Gutch, it is contended, that a proprietor of a newspaper, who is not shown to take, or who can show that he took no part in the publication of the newspaper and of the libel in question, is not criminally responsible. Now, whether it is so shown in this case is a fact for you to consider, but I am bound to state the law as I have received it from my predecessors. I cannot propose to you a different rule from what I find adopted by those who have filled my situation before me. Now it is conceded that it has been held, in several cases, that a proprietor so situated is criminally answerable. But it is said that this is a different principle from that which prevails in all other criminal cases, but this does not appear to me to be so, the rule seems to me to be conformable to principle and to common sense; surely a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether.

Vol. II. p. 35.—*Where the Defendant has admitted, &c.*

An admission of being the publisher of a periodical work cannot be extended beyond the date of such admission. *M'Leod* v. *Wakeley*, 3 C. and P. 311.

Vol. II. p. 64.—*Special Damage.*

The declaration alleged that certain persons, (naming them,) who would otherwise have employed the plaintiff, refused so to do; the proof was, that by reason of the speaking of the words, the persons named would have recommended him to others, which others, had he been so recommended, would have employed him; held that the declaration was not supported by the evidence for the non-employment arose from the non-recommendation. *Strong* v. *Foreman*, 2 C. and P. 592.

Vol. II. p. 67.

Where an indictment had been preferred against the plaintiff and *another*, and a copy had been obtained on behalf of the *latter only:* it was held, that the plaintiff was entitled to use it in evidence, and the court would not inquire by what means it had been obtained. It was also held, that misconduct, on the part of the defendant towards the *other* party indicted was evidence, as part of the res gestæ, and as tending to show the malice of the defendant. The court also held, that it was no bar to the plaintiff's recovering that a rule for a criminal information had been obtained, but not proceeded in. *Caddy* v. *Barlow*, 1 M. & R. 275.

Vol. II. p. 74.—*Malicious Prosecution, fact of Malice.*

A bill of exchange was addressed to Mr. J. Spencer, No. 3, Sidmouth Street, and purported to be accepted by him, the plaintiff's name was J. Spence, and he resided at No. 3, Sidmouth Street, but the acceptance was not his; and when the bill was at maturity, he denied the acceptance, but the fact of denial was not communicated to the defendant, the holder of the bill. The defendant having arrested the plaintiff, it was held, in an action for malicious arrest, that there was no evidence of malice, and the plaintiff was nonsuited. *Spence* v. *Jacob*, 1 M. & M. 180.

Vol. II. p. 98.—*Referred to the same, &c.*

So where the libel purported to be a report of a coroner's inquest, Lord Tenterden, L. C. J. held, that what really passed at the taking of the inquest was evidence under the general issue in mitigation of damages. Being short of a justification, it is upon the general principle admissible as governing the damages. ***East*** v. *Chapman*, 1 M. & M. 46.

The defendant may show, in mitigation, that he copied the libellous paragraph from a public newspaper, but not that many other journals published the same statement. *Saunders* v. *Mills*, 6 Bingh. 213.

Vol. II. p. 266.

In the case of the *King* v. *Gilham*, 1 M. & M. 165, it was held, that the exhibiting in an assize town inflammatory publications concerning a prisoner about to be tried at the assizes for a crime, was not a contempt which the judge of assize could interfere to prevent by commitment.

Vol. II. p. 363.

In the case of the *King* v. *Bradley*, 2 M. & R. 152, the court of K. B. is stated to have observed, on a defendant being brought up to receive judgment for a libel, after conviction upon the trial of an information, that he could not then urge the truth of the charge after having been put to fair proof of it upon the trial. —*Quære.*

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THE END.

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